ADMINISTRATIVE GUIDANCE : A PUBLIC LAW STUDY

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"New forms of law,legal tissue in the making,always appear at first as manifestations of extra-legal absolutism:"
W A Robson
(in evidence submitted to the Committee on Ministers' Powers)

In accordance with Regulation 2.4.15.,I declare that this thesis has been composed by myself and that the work contained herein is my own.

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ABSTRACT OF THESIS (Regulation 7.9)

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CHAPTER ONE-Examines the characteristics of administrative guidance and notes the apparent significance of these provisions for official decision-making affecting individuals and groups within our society. Questions concerning the legal status and effects of administrative guidance are raised and their treatment in the existing literature evaluated. This piece of research is then justified because of the contemporary developments in the legal responses to administrative guidance, together with the philosophical demands that the scope and aims of public law should be broadened and re-defined to encompass the modern processes of state decision-making.

CHAPTERS TWO/THREE-Consider the organisational context within which administrative guidance is created and utilised. Theoretical writings by social scientists on the roles of rules within complex organisations are critically assessed, and the insights from these writers applied in the analysis of an empirical study of the use of administrative guidance by the Scottish Education Department's Awards Branch.

CHAPTER FOUR-Places the advocacy of administrative rule-making as a strategy for controlling administrative discretion by K C Davis within its American constitutional framework through an examination of the Federal judicial and legislative reactions to such provisions.

CHAPTERS FIVE/SIX/SEVEN-Are preceded by the creation of a classification of administrative guidance, which is then used to analyse the responses of the Parliamentary Commissioner for Administration, the courts and a major tribunal system (V.A.T. tribunals) towards administrative guidance.

CHAPTER EIGHT-Concludes the thesis by scrutinising the degree of harmony existing between the responses of the various British grievance-handling agencies, and the compatibility of these reactions with the organisational needs of central government departments. Finally proposals, including both those needing legislation and those which do not require the intervention of Parliament, derived from the findings of this research and designed to strengthen the citizen's legal position vis-a-vis guidance governed decision-making are suggested.

CONTENTS

PREFACE

The gestation of this thesis has occurred over two distinct spells of time. First between 1982-1984 when I was a full-time research student at Edinburgh. During that period the bulk of the research was undertaken and the initial drafts of Chapters One to Four completed. Then I was fortunate enough to gain my present position at Lancaster and consequently the completion of this work has had to be accommodated within my other professional commitments. However,this latter era has enabled the incorporation of significant recent developments,particularly in the field of judicial consideration of administrative guidance,and I have tried to present an examination of the academic and practical legal status of administrative guidance as of August 1986.

Inevitably I have incurred many intellectual and personal debts through the course of my post-graduate years. Professor A W Bradley has continually expended more time on discussing and reading my work than any reasonable research student could expect. Dr.David Nelken has done his best to try and educate me towards a limited understanding of the substance and methodology of social science research. Apart from my supervisors others,including Dr.Keith Ewing and Chris Himsworth, did much to support my post-graduate studies. Also Professor John Reece of the University of Denver provided detailed help on the American materials examined in Chapter Four. And beyond specific individuals the ethos of research within the Faculties of Law and Social Sciences at Edinburgh enabled my time there to be stimulating and enjoyable. Thanks to the Economic and Social Research Council's funding of my studies I do not have to acknowledge an outstanding financial debt to any institution!

For help with the typing of the thesis I wish to thank Sharon,Pauline Bowman,Christine Gane,Heather Watt,Helen Whittaker and latterly Atari for the production of my personal computer.

Finally,but far from last,I desire to express my gratitude to my parents for their consistent support of my whole education and much more,consequently for those reasons,and not convention,I dedicate this work to them.

Alastair R. Mowbray
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CHAPTER ONE

INTRODUCTION

The Nature and Characteristics of Administrative Guidance

According to Willis, "Parliament is the heart, the Civil Service the head and hands, of our government".[1] Developing that metaphor administrative guidance could be described as the impulses travelling through the nervous system from the brain to the fingers of our governmental anatomy. On a more prosaic level administrative guidance will be defined for the purposes of this work as encompassing official written provisions establishing the views of central government departments on their powers, policy goals and methods of action. But can such seemingly innocuous items really deserve a deeper examination when juxtaposed with the numerous other facets of modern state-citizens relations? Probably the best way of answering this basic question at such an early stage in the enquiry is to outline briefly three situations where administrative guidance played a central role in determining how various groups of citizens were treated by different departments so that we may gain an impression of the types of matters regulated by administrative guidance, and its potential significance for society as a whole.

In one instance[2] a woman returned from Hong Kong with some furniture; after her arrival she completed a customs declaration inaccurately through "carelessness" and later her error was discovered by a customs officer. Subsequently special investigation officers interviewed the woman and came to the opinion that there was a prima facie case for prosecuting her

for "recklessly" completing a customs declaration contrary to S.167(1) of the Customs and Excise Management Act 1979. However, in accordance with the terms of their administrative guidance the officers offered to "compound" the proceedings, (i.e. not to bring charges against the woman) in return for a penalty payment of £280. The woman immediately accepted the compounding offer. Afterwards she reached the conclusion that the Department had treated her badly and requested the Parliamentary Commissioner for Administration [hereafter P.C.A.] to investigate her case. The P.C.A. reported that while the particular officers had properly observed their applicable administrative guidance, the nature of the proceedings

> "...does place a clear responsibility on the Department's officers to take great care that they have a proper case for prosecution before they offer compounding, since they are making quasi-legal judgments, most of which will never be tested in a court of law. I am therefore concerned to find that the instructions given to officers, who have to decide whether someone has been guilty of the offence of recklessness in completing a Customs declaration, are fragmentary and imprecise."[3]

He then elaborated upon the defects in the administrative guidance, including their incorrect legal definitions, the failure to require officers to notify suspects of their right to seek legal advice before accepting a compounding offer, and the rigid correlation between amounts of revenue involved and the penalty payments specified. In the light of this criticism the Principal Officer of the Department agreed to review the contents of the guidance and remit the woman's penalty.

Secondly,[4] a man who practised accountancy (but was not a member of any recognised professional body) sought to be authorised as a company auditor by the Secretary of State for

Trade under his power, granted by S.161(1)(6) of the Companies Act 1948, to approve individuals who have "obtained adequate knowledge and experience" in the course of employment by a member of a recognised accountancy body. Despite the fact that the applicant had been an articled clerk for four years followed by seven years of private practice, his application was refused. He complained to the P.C.A., who discovered that the Department had developed a detailed regime of administrative guidance to govern the exercise of the above statutory discretion, none of which had been published. These provisions required a successful applicant to have inter alia been employed for at least ten years by a professionally qualified accountant, with five of those years having been at a senior level; during the latter period a minimum of seventy-five per cent of the applicant's time must have been spent on company auditing. Consequently the P.C.A. concluded,

> "it is the complainant's misfortune that he has been unable to satisfy the Department, but I have found no grounds for thinking that they have dealt with him harshly or any differently from any other person with similar knowledge and experience".[5]

Thirdly,[6] a prisoner complained to the P.C.A about the Home Office's method of calculating prisoners' Parole Eligibility Dates. By S.60 of the Criminal Justice Act 1967 where the Parole Board so recommends, the Home Secretary may release a prisoner on licence once he has served a minimum of one third of his sentence. However, where a prisoner has escaped during his period of lawful detention, S.49 of the Prison Act 1952 provides that his time at large shall be ignored when calculating the remainder of his sentence to be served. The Home Office's relevant administrative guidance interpreted the combination of

these two statutory provisions to require the addition of the total sentence plus any time unlawfully at large to provide the time period from which the one third eligibility factor would be determined. After considering the legislation the P.C.A. reported,

> "it seems to me however that this method was a misinterpretation of S.49 of the Prison Act 1952, and in particular of the provision there that no account should be taken of any time during which the prisoner was absent from the prison... I suggested to the Department that in computing the Parole Eligibility Date the proper method of calculation to comply with the provisions of the Act, was to take one-third of only the number of days in a sentence... but taking no account of time at large, and then to defer the date thus arrived at by the time spent at large".[7]

Following this recommendation the Home Office altered their guidance to accord with the P.C.A.'s interpretation, and reviewed the Eligibility Dates of all affected prisoners.

Without entering into a premature analysis of the above cases, it can be observed that they indicate that administrative guidance may be found in many administrative contexts across the range of central government activities. Such guidance may establish the procedures civil servants should observe when dealing with citizens, (e.g. the modifications to the Customs and Excise guidance requiring investigating officers to notify suspects of their right to obtain legal advice before accepting a "compounding" offer), or it may contain interpretations of statutory provisions, (as the Home Office's guidance on parole dates did), or it may set out the detailed basis upon which a broad statutory discretion will be exercised, (e.g. regarding the Secretary of State for Trade's power to approve individual company auditors). Furthermore these examples suggest that administrative guidance touches on significant aspects of

governmental activity that may impinge upon many citizens' most basic legal freedoms and obligations, including their liberty, their ability to engage in business and their subjection to the processes of the criminal law. Yet they may not know the contents of the applicable administrative guidance nor that it even exists! Additionally many questions are raised by these cases concerning the legal nature of the different forms of administrative guidance, e.g. the extent to which the departments can lawfully promulgate and act upon them; the circumstances in which departments are legally bound by their guidance; and the forums open to a citizen to challenge administrative guidance either generally or with regard to its particular application to him. It is, therefore, to be hoped that the foregoing brief excursus into the actual world of administrative guidance has hinted at some of the practical and legal reasons why this phenomenon deserves our attention.

The next basic questions which must be answered are why select the nomenclature of administrative guidance for this phenomenon and what are the salient characteristics of these provisions? From an examination of the published reports of the P.C.A., coupled with a fieldwork case study of the Scottish Education Department's Awards Branch (both of which will be examined in detail later in this thesis) the following explanations and discoveries are offered in response to the above questions. From the P.C.A.'s reports we learn that there is no consistent official terminology applied to administrative guidance, with various departments using expressions such as "standing orders", "standing instructions", "internal working instructions", "guidelines", "departmental instructions" and "administrative conditions". It was therefore necessary for this work to propose, and utilize, a general expression capable of

applying to all the provisions subject to the above phraseology. Guidance was selected because the provisions have varying degrees of specificity and normativity[8] which can all be brought within its ambit. The spectrum of specificity is graphically illustrated by comparing the Department of Trade's guidance on what it considered fell within the category "plant and machinery" in S.1 of the Industrial Development Act 1966, which extended to fine distinctions between types of wall insulation[9]; with the Department of the Environment's provision that it would order a party to a statutory inquiry who had behaved "unreasonably" to pay the costs of the unsuccessful party[10]. As to the continuum of normativity embraced by these provisions the Awards Branch case study revealed how the applicable guidance incorporated precise rules (e.g. if an applicant's parents home was within forty five minutes travelling time of the educational institution attended, only the home rate of grant was payable), and also suggested aids to decision making, (e.g. questions that might be posed when determining if an applicant was "ordinarily resident" in Scotland - such as "where did they go in their school vacations?[11]).

The term administrative was chosen as the other half of the phrase in order to signify that these provisions have not been subject to any Parliamentary proceedings during their promulgation. This distinction is important in distinguishing such provisions not only from delegated legislation, that is where Parliament authorises a Minister or other person to issue rules which when intra vires have the force of law (e.g. S.73 of the Education (Scotland) Act 1980 which enables the Secretary of State to issue regulations governing the award of student grants); but also from the newer hybrid forms of regulation emanating from Parliament e.g. the Immigration Rules issued under

S.3(2) Immigration Act 1971[11], directives given to the Civil Aviation Authority by the Secretary of State for Trade under the Civil Aviation Act 1971[12] and the growing numbers of codes of practice provided for by statutory provisions such as those on Picketing and the Closed Shop issued under S.3 Employment Act 1980. Hence administrative guidance is not imbued with any express statutory or Parliamentary authority which, as will be discovered later, undoubtedly influences judicial reactions towards its validity and effects in law.

Other characteristics of administrative guidance include the fact that in many situations it is these provisions which provide the official basis for civil servants' actions when dealing with members of the public. Consequently individual civil servants frequently justify their treatment of particular cases, to both their superiors and external agencies, in terms of the contents of the relevant guidance rather than the legislation upon which the legality of the administrative process ultimately rests. For example, until 1976 the Secretary of State for Health and Social Services exercised his discretion under S.33 Health Services and Public Health Act 1968 to provide motor vehicles for severely disabled persons. A woman of fifty eight who suffered from the effects of polio in one leg sought to obtain a car with an automatic gearbox from the Department; however, after aptitude tests they were only willing to offer her a car with a manual gearbox. Eventually the woman had her complaints referred to the P.C.A. who found, "the discretionary powers were exercised under administrative arrangements and these included rules defining the special categories of people who could qualify for motor cars".[13] He later concluded that the Department had applied those rules of administrative guidance to the complainant's situation "fairly" and therefore no question of maladministration

arose. The case clearly demonstrates that the effective criteria upon which the complainant's request was judged by the officials were contained in internal administrative guidance, and not the broad statutory power which was the constitutional source of the whole scheme.

Another feature of administrative guidance is that it normally applies to all citizens coming within its scope, hence guidance tends to demonstrate a degree of generality in coverage.[14] An example is[15] that in 1974, due to the depressed state of the property market, the Financial Secretary to the Treasury announced in the House of Commons that as a temporary measure the Inland Revenue would allow a "modest extension" to the time period during which increases in property values would be immune from Capital Gains Tax. Later the Department issued a press release in which details of the concession were given; essentially these provided that the statutory immunity for the last twelve months of ownership (prescribed by S.29 Finance Act 1965) would be extended to twenty four months, but if the owner had not been living in the property for over twenty four months when it was finally sold he would only be given the statutory twelve month immunity. A person left his house in January 1974 and eventually sold it during January 1977; when he applied to the Department for the twenty four month relief period it was refused in accordance with the terms of the administrative concession. Eventually the P.C.A. investigated his complaints noting, "the Department recognise that, as with all rules, there were bound to be hard cases on the margin; but they said the complainant had been treated correctly within the terms of the law and the concession, and it would be unfair to others who had to accept the rules as they stood to discriminate in his favour".[16] The P.C.A. then considered whether the

Department should have been willing to examine individual cases falling outside the terms of the concession to determine if they ought on their own merits to have been awarded the benefit of the twenty four month period; he reached the conclusion that such treatment would not have been reasonable. Passing over for the time being, the constitutional implications of tax concessions being granted by administrative means, this case unequivocally presents a Department with the P.C.A.'s subsequent approval applying their administrative guidance to all taxpayers and strongly resisting claims to allow exceptions or modifications to the generality of those provisions in individual cases.

Finally, and following on from the facts of the above example, administrative guidance sometimes penetrates beyond the world of departmental civil servants via assorted publications. The forms of these publications include (a) circulars to other governmental bodies (e.g. Circular 100 of the Department of the Environment which set out the types of consultations that government departments would engage in with local planning authorities when the former decided to exercise their prerogative power to undertake "development" without obtaining planning permission)[17]; (b) white papers (e.g. the Inland Revenue's paper of July 1971[18], which announced administrative concessions regarding income tax legally due but subject to delayed assessment caused by administrative failures); and (c) the myriad of official booklets and pamphlets outlining particular administrative schemes (such as the Department of Energy's leaflet E.L.1. on the non-statutory Electricity Discount scheme operated during the winter of 1977)[19]. This work would not be the first to note the potentially sporadic nature of the above forms of publication; in 1944 the then R.E. Megarry

commented,

> "speeches or replies to questions in Parliament, announcements in the press, miscellaneous official publications, letters to private organisations written by one Government Department or another, unofficial reports and so on, may all constitute the primary sources of this quasi-law".[20]

Therefore, we shall be examining the extent to which these publications summarise the actual administrative guidance utilized by civil servants when the details of the Awards Branch case study are discussed, together with an evaluation of the significance of publication of the contents of administrative guidance for the reactions of the courts and the P.C.A. to such provisions.

Now that the nature and characteristics of administrative guidance have been outlined in the context of actual examples, it is appropriate to undertake a brief review of the literature to discover how other British administrative lawyers have viewed the phenomenon and the challenges it presents to legal thought.

The Existing British Literature on Administrative Guidance

In a very rough way it is possible to divide the consideration, or non-consideration as the case may be, of this topic in the literature into three broad chronological eras. The first period included works up to the beginning of the Second World War and was undoubtedly dominated by Dicey together with his intellectual legacy. The combination of his constitutional principles of the Sovereignty of Parliament and the Rule of Law allied with their denunciation of a distinct body of administrative law in the guise of French "droit administratif"[21] ushered in the twentieth century and

overwhelmed virtually all pre-Nineteen Forties writings on the subject of administrative law in Britain. Indeed until 1915 Dicey believed English law had not recognised anything resembling a corpus of administrative law.[22] However, in that year he appeared to accept that increasingly interventionist legislation was giving birth to such a development. But he felt that his principle of the Rule of Law was still protected from this growth because,

> "the fact that the ordinary law courts can deal with any actual and provable breach of the law committed by any servant of the Crown still preserves that rule of law which is fatal to the existence of true droit administratif".[23]

Yet fourteen years later Lord Hewart considered that both Dicey's principles were under siege from the "new despotism" which he defined as,

> "the various devices of bureaucracy to give departmental decisions the force of a statute, to prevent them from being reviewed by any process in a Court of Law, and to ensure that the mere fact that a departmental decision has been given must be treated as conclusive evidence that the requirements of the law have been duly fulfilled".[24]

In the course of his criticism of "administrative lawlessness", the Lord Chief Justice adversely compared adjudicative decision-making by civil servants with that undertaken by the courts noting,

> "...it is possible, no doubt, that the public official who decides questions in pursuance of the powers given to his department does act, or persuades himself that he acts, on some general rules or principles. But, if so they are entirely unknown to anybody outside the department, and of what value is a so called "law" of which nobody has any knowledge?"[25]

It appears that Lord Hewart was referring there to what we have termed administrative guidance, with the criticism that the provisions were unavailable to affected citizens. Later

commentators also took up this aspect of guidance as we will soon discover. Despite the fact that Lord Hewart's book was polemical in tone and in some places[26] reflected an almost conspiracy theory attitude towards the advocates of an interventionist-collectivist state it fired the imagination of influential groups in society[27], leading to the appointment of an official committee to review the question of ministerial powers. The report of the Donoughmore Committee[28] impliedly found Lord Hewart's fears "exaggerated", and went on to suggest procedural and institutional reforms which they considered would allow the expansion of state powers without the destruction of Dicey's two constitutional principles. Generally during this period administrative lawyers were so concerned with the twin issues of departmental adjudication and the creation of delegated legislation that little, if any, consideration was given to administrative guidance[29].

The next era in the literature covers the wartime activities of the administration and it seems that these prompted a limited evaluation of administrative guidance by two eminent lawyers. Reference has already been made to Megarry's note in 1944 on "Administrative-Quasi Legislation"[30] in which he distinguished two categories of provisions. Firstly there was the "state and subject type" composed of,

> "...announcements by administrative bodies of the course which it is proposed to take in the administration of particular statutes".[31]

He felt that where this consisted of interpretations of statutory phrases which had not been subject to an authoritative judicial ruling, the quasi-legislation was permissible; however, where it amounted to administrative policies which contradicted express statutory language, such provisions were "undesirable". The

second category of quasi-legislation was the "subject and subject type" which involved

> "...arrangements made by administrative bodies which affect the operation of the law between one subject and another".[32]

This type was also unacceptable to the lawyer because of the "gloss" it added to statute and case law. Megarry approached quasi-legislation from the perspective of the practitioner who desires to discover the legal status of his client's position and therefore,

> "...the main objection to administrative quasi-legislation is its haphazard mode of promulgation".[33]

One year later Allen returned to the subject of "quasi-law" by broadly viewing it as the product of wartime exigencies. However, he also acknowledged that aspects of the phenomenon possessed an extensive lineage as,

> "it has long been the practice of the Inland Revenue Department to issue for official use rulings and interpretations of the enormously complicated Finance Acts, as well as codes of 'concessions' to taxpayers. None of these, in theory, have any legal force, but in practice they have an important effect, because they are followed by revenue officials throughout the country - they are, indeed, the Inspector's Bible - and few taxpayers have the hardihood to test them in the Courts".[34]

This passage is very important because it indicates that what we have termed administrative guidance existed many years ago, but the early administrative lawyers seem to have been unable or unwilling to probe into this topic further and Allen fruitlessly commented,

> "the defence doubtless is that these are emergency measures at a time when Parliament is hard pressed, but they are, in my submission, pessimi exempli, whatever convenience maybe, and it is greatly to be hoped that they will not be extended or imitated in peace time".[35]

The third era takes us from the post war years to the present day. Outside the textbook writers administrative guidance has been subject to little academic analysis. Jowell provided a theoretical assessment of the costs and benefits of subjecting administrative decision-making inter alia to rules [36], and then later applied a similar perspective to an examination of various questions raised by the administration of social security programmes in America[37]. Freedland noted some of the constitutional and practical implications of departments operating the bulk of particular social welfare schemes on the basis of administrative guidance, because,

> "it must be a matter for some concern that such a very important set of, in effect, legislative provisions can be made entirely within a government department on a totally discretionary basis and that as a result of these attributes, they can pass almost entirely unnoticed".[38]

However, in the treatment accorded to administrative guidance by the contemporary textbooks we can detect a gradual but significant alteration in the status accorded to the phenomenon by administrative lawyers. For example in 1967 Griffith and Street were satisfied to deal with these provisions in one paragraph, concluding,

> "...their effect is considerable although they are not legally enforceable".[39]

While ten years later Wade and Phillips[40] accorded the phenomenon a distinct entry in their chapter on delegated legislation under the guise of "administrative rule-making". They viewed these provisions as a response to the formalities and complexities of delegated legislation with the caveat that,

> "like any large organisation, a department may wish to give instructions to its staff on purely internal matters without publishing them. But it is contrary to both legal and democratic principles that rules which directly affect the interests of the citizen should not be published."[41]

Once again, therefore, we can discern the commentator's concern with the secret nature of much administrative guidance. Foulkes also examines various types of administrative guidance by classifying them in relation to the medium of their publication e.g. circulars, ministerial statements and codes of practice.[42]

Garner[43] continues the language of "quasi-law", while acknowledging that in an administrative, as opposed to a judicial, context these provisions "have the effect of law". Wade[44] would like to be able to draw a sharp distinction between the legal effects of "administrative" and "legislative" rules, but has to admit that the judiciary have not responded in such a consistent way. However, he is rather dismissive of the former category:

> "mere administrative rules, for example for the internal management of the civil service, or for extra statutory concessions to taxpayers are not legislation of any kind. In the former case the power behind the rules is simply that of an employer over an employee rather than a power conferred by a statute, and in the latter case no power is needed".[45]

However, Craig, in one of the most recent books on the subject of administrative law, considers that what we have termed administrative guidance is of great significance both for individual citizens and academic lawyers because,

> "the precise status of such rules may be unclear; they may be unknown to the public and are often subject to no external scrutiny. This does not prevent them from being dispositive of the result in any particular case. I am not arguing that we should attempt to prevent the creation of such rules,

quite the contrary. Rather that we should recognise their existence, the absence of controls over them and consider what should be done about them".[46]

He continues by outlining some possible explanations for the existence of these provisions, several of which have already been mentioned e.g. the procedural obligations of delegated legislation and the ability to engage in informal statute law reform via administrative interpretations; however, for him the primary stimulant encouraging the growth of administrative guidance is to be found in the nature of present day large scale administration, since

"...even where no explicit power to make regulations is granted, the administration will make rules or policy statements which indicate how it will exercise its discretion. This is a natural tendency for bureaucracies when faced with a recurring problem. The problem is not thought out afresh each time. This would be a waste of administrative time and could lead to inequitable results by treating like cases differently. A rule will be devised which can be applied to those lower down in the administrative hierarchy".[47]

The reports of the P.C.A. provide numerous examples of the above process at work. In a subsequent chapter therefore we shall be examining some of the social science writings upon organisations to consider what theoretical insights they may provide on the organisational causes and attributes of administrative guidance.

To conclude this overview of relevant publications[47*] it can be noted that the existing treatment of the provisions we call administrative guidance has been very sketchy. Until the Nineteen Forties the likely reason for that understandable neglect was the pre-occupation of the early writers with the monumental task of creating a coherent and systematic discipline in the shadow of Dicey's aversion from and dislike of anything resembling droit administratif. Moreover, the major explanation

for post-war responses may have been the practical one of the difficulty of discovering the extent and influences of unpublished guidance upon administrative decision-making. Hence it is interesting that the lone wartime comments by Megarry and Allen on "quasi-law" occurred in the context of published provisions containing constitutionally controversial terms, e.g. the Treasury's 1943 administrative extension of property owners' rights regarding requisitioned premises. However, in the last twenty years virtually all the textbook writers have acknowledged the practical significance of these provisions, combined with an almost inexorable rise in their status on the agenda of contemporary problems; so that by 1983 Craig was subjecting them to an evaluation co-extensive with that conferred upon delegated legislation.

It is the present writer's belief that the present time calls for a detailed examination of administrative guidance as both practical and academic forces have coincided to encourage such a project. At the practical level the creation of the P.C.A. in 1967[48] marked a watershed in the general availability of materials, revealing how central departments perform many of their administrative tasks, together with the significance of administrative guidance in those operations. We have already seen how his reports may be useful in discerning the characteristics of guidance and in a later chapter his general responses to these provisions will be analysed. There are also indications in the case law that the judiciary are gradually beginning to alter their traditional denunciation of policy rules[49]; while the expansion of the concept of fairness is allowing novel legal obligations to be placed on the promulgators of administrative guidance[50]. The outcome of these apparently unrelated doctrinal developments is that one can no longer

unequivocally state that guidance has no legal force. Furthermore the publication and analysis of the P.C.A.'s reports offers administrative lawyers the opportunity to increase their awareness of departmental usage of guidance just as the courts appear to be changing their attitudes towards these provisions, with the possible benefits of cross-fertilization and harmonization between the reactions of the two agencies. Finally,

positive transformations in historic legal and executive practices regarding guidance are being forced upon recalcitrant domestic judges and administrators by both the European Commission of Human Rights and the European Court of Human Rights. One example will serve to make this clear. In the case brought by Silver and five other prisoners together with a teacher who had been communicating with another prisoner, the Commission unanimously found[51] that the censorship of fifty-six letters written by the applicants violated Article 8 (respect for correspondence) of the European Convention on Human Rights and Fundamental Freedoms. The Commission discovered that although the domestic legal basis for the censorship regime was to be found in the Prison Act 1952, and the Statutory Prison Rules made under the preceding Act, the detailed regulations governing control of prisoners' communications were to be found in unpublished administrative guidance.

> "In order to ensure uniformity of practice throughout prison establishments, the Home Secretary issues confidential management guidelines to the prison governors. These are Standing Orders and Circular Instructions. Their contents are not known by the public or prisoners. As regards prisoners' correspondence the Standing Orders and Circular Instructions set out the general guidelines along which the Secretary of State has decided to exercise the discretion stated in rules thirty- three and thirty-four of the Prison Rules 1964."[52]

The British Government sought to argue that the restrictions on correspondence contained within the above provisions were "in accordance with the law" as required by Article 8. However, following the jurisprudence of the Court regarding the meaning of this phrase, the Commission determined that it necessitated inter alia "adequate accessibility" and "sufficient precision" in the provisions authorising interferences with an individual's correspondence. When the Commission applied these tests to the Home Secretary's administrative guidance they concluded,

> "...unless particular administrative restrictions could be reasonably deduced from the Prison Rules 1964, their application in interference with a prisoner's right to respect for correspondence could not be said to be 'in accordance with the law' within the meaning of Article 8(2) as they would satisfy neither of the Court's criteria of accessibility or foreseeability".[53]

Few of the censorship provisions met these conditions and therefore the Commission found they infringed Article 8. Subsequently the Court considered this case[54] on its referral by the Commission. Broadly the Court agreed with the opinion of the Commission. However, they appeared to allow the British Government a greater leeway in the use of administrative guidance by holding,

> "...that although those directives did not themselves have the force of law, they may - to the admittedly limited extent to which those concerned were made sufficiently aware of their contents - be taken into account in assessing whether the criterion of forseeability was satisfied in the application of the Rules".[55]

Despite this limited relaxation of the situations in which governments could claim that their censorship regulations contained in administrative guidance were "in accordance with the law", the Court unanimously held that many of the Standing Order Instruction restrictions were unlawful, and that the censorship

of fifty-seven letters violated the Convention. This litigation resulted in the Home Secretary altering the substance of his administrative guidance and for the first time publishing the majority of its content. Secondly, both the opinion of the Commission and the judgment of the Court regarding the applicants' claims under Article 13 (right to an effective remedy before a national authority) have placed further pressure on the judiciary to revise their attitudes towards the Prison Rules and prisoners' rights generally.[56] Finally, the developing jurisprudence of the Court on the nature of "law" for the purposes of Articles 8 and 10 poses a significant and desirable deterrent to the Government's use of administrative guidance to restrict the scope of these fundamental rights.

Turning now from the above developments in domestic and international law to another factor encouraging a contemporary examination of administrative guidance, we can justify this piece of research in terms of its sympathy with the objectives of those academics who wish to re-orientate the priorities and study of administrative law so that they accord more fully with the processes of modern state decision-making. For instance in 1974 Bradley noted that traditionally,

> "the emphasis in legal authorship has been on the principles of judicial review applied by the superior courts..."[57]

yet

> "...in Britain no less than in the U.S.A. there are many areas of governmental discretion directly affecting individual citizens where there is no close scrutiny by the

courts or for that matter by Parliament."[58]

Consequently he advocated the devotion of greater research efforts towards examining the substance and exercise of official discretions, with the belief that the results would improve both the teaching and theoretical understanding of administrative powers. McAuslan has been critical of administrative lawyers' limited theorising[59], and in his Chorley Lecture returned to the attack with a penetrating criticism of the direction and implications of administrative law's focus over the last quarter of a century. In his own words,

> "but, sacrilegious though it may be to say so, Franks, in some respects, has obscured for administrative lawyers an understanding of the broad trends of evolution of government and adminstration in the last 25 years. This is because of its, and our, concentration on tribunals and inquiries, and the result is that we now seem somewhat ill-equipped to deal with, or make sense of, the major clashes of policy and ideology taking place within our system of administrative law... The attention of lawyers, in other words, was directed towards the issues of fair hearings for individuals in court-like proceedings; and away from the issues of policy-formulation, the allocation of resources and collective decision-making within the processes of collective consumption".[60]

Partly in response to McAuslan's call for more theorising administrative law Prosser has indicated how he believes one such theory could be developed[61]. Underlying his proposal is the belief that the existing attitudes towards administrative law are deficient because of inter alia the assumption,

> "...that what is legally relevant is composed exhaustively of rules which pass formal tests of legal validity. Thus in English terms statute and case law provide the basis for the subject, with an occasional nod towards statutory instruments. This ignores the multifarious forms of modern state intervention through less formal devices such as circulars, tax concessions and the diverse methods of state economic management".[62]

In case these analyses appear to be portraying British administrative law in a too negative manner it may be some consolation to discover that American academics are also engaged in similar heartsearching. Mashaw, for example, has stated that,

> "...to be blunt the history of American administrative law is a history of failed ideas".[63]

After outlining the difficulties of judicial interventions in the procedures and substantive programmes of government bodies he concludes,

> "if then, by 'administrative law' we mean that set of doctrines concerning the rights of citizens to hold administrators accountable in court, administrative law has a simple lesson; the citizen has a right to keep officials from straying beyond some large and loose requirements of clear statutory language, procedural regularity, and substantive rationality. Within these boundaries there lies a gigantic policy space, invisible to the legal order because devoid of justiciable rights. Moreover, as the administrative state has grown, as more 'rights' have been generated and defined by a combination of legislative and administrative action, this <u>externally orientated administrative law,</u> that is, a law orientated towards justiciable rights enforced against administrators in court, has become increasingly irrelevant to the realization of our collective ideals".[64] (emphasis mine)

His answer is to suggest the creation of an agency possessing several characteristics similar to our P.C.A., that will scrutinise, promote and enforce the "internal law" of governmental agencies. From our perspective it is very interesting to learn that Mashaw considers this 'internal law' to be composed of,

> "...unpublished written instructions and interpretations combined with standard bureaucratic routines and with developmental and decisional practices".[65]

or what we have termed administrative guidance!

In response to the pleas noted above we have tentatively shown that administrative guidance is a significant factor in many different types of administrative decision-making, and that the decisions finally reached may affect fundamental features of citizens' lives which, when combined with the relative neglect of the phenomenon by British administrative lawyers, amplifies the necessity for a contemporary examination. Furthermore acknowledging the validity of many of the previously examined criticisms this work will seek to venture beyond the judicial case law governing administrative guidance in order to obtain a clearer understanding of both how administrative guidance is used in practice, and the responses of the several grievance agencies[66] falling within the domain of administrative law. While this work entertains no pretensions towards establishing a grand theory of administrative law, it does seek to attempt a reconciliation between administrative behaviour and legal thought in the field of these provisions which may enable administrative law to become more realistic in its demands and therefore of greater value as a tool for regulating state-citizen relations.

An Outline of the Basic Concerns and Nature of the Research

As the phenomenon of administrative guidance has been defined and its treatment in the British literature examined, attention can now be directed towards the structure of this thesis. The first observation to be made is that the research seeks to examine the legal implications of administrative guidance across

the range of central government departments, rather than to engage solely upon an in-depth case study of one or two departments' use of these provisions. This approach was chosen in order to demonstrate that guidance is not merely of localised concern to specialist lawyers (e.g. revenue lawyers enraged about extra statutory tax concessions[67], or civil liberties lawyers worried by the legal weaknesses of prisoners rights[68]), but raises questions, and presents problems, which are universal to all public lawyers. Furthermore this orientation allows the work to analyse the general responses of the courts and the P.C.A. towards administrative guidance, in order to discover if uniform reactions regarding similar types of guidance are produced, or whether distinctions are drawn in departmental usage. Moreover, comparisons between the responses of the various grievance agencies to administrative guidance are encouraged by this breadth of study.

The second strategy adopted by the thesis is to have regard to the organisational context within which administrative guidance operates. As the departments' use of guidance appears to be intimately connected with their functioning as complex organisations (e.g. the guidance directing Customs and Excise Officers' exercise of the power to compound proceedings which covered inter alia the amounts of financial penalties which could be imposed by the different grades of officer and the procedure for passing up difficult cases[69]) a subsequent chapter will be examining some of the most prominent social science writings upon organisations to discover what insights they may provide into the theoretical explanations and practical features of administrative guidance. Those insights will then be applied when we analyse the results of the fieldwork carried out into the Awards Branch's use of guidance. This fieldwork will also enable us to view a

part of the civil service's operation and application of guidance at closer quarters than even the P.C.A.'s reports allow.

Thirdly the dissertation will involve a degree of comparative study in that one chapter will be devoted to evaluating the American legal attitudes towards administrative rulemaking. The bulk of this chapter will be devoted to considering K.C. Davis's arguments in favour of the expansion of such rulemaking and balancing them against the recent decisions of the Federal Courts. We shall then be able to discuss the relevancy of the U.S. experience to British case law.

Turning to the chronological order of the thesis and the main issues to be examined in each chapter, we shall firstly consider the organisational nature of administrative guidance, followed by the American materials, and then present a detailed analysis of the British grievance agencies' responses. Chapter Two will outline some of the main social science writings upon complex organisations, the emphasis being predominantly sociological and including the following schools of thought, Weber, Human Relations, Post-Weberian, Decision Making and Systems. After each school's conception of the nature of these organisations has been briefly noted, we shall be examining how they portray the role or roles of rules in these conceptions, together with the importance ascribed to rules in them. The primary objective of this chapter will be to discover if the theorists provide any insights into the organisational causes or attributes of what we have termed administrative guidance that may be relevant to administrative law's responses to the phenomenon. So for example, we shall be looking to see if the writers establish any

classifications of administrative guidance that might be helpful in systematizing the reactions of the British grievance agencies, or whether they indicate that aspects of the traditional legal response may have been wrongly developed from an organisational perspective (e.g. the judicial dislike of rule governed decision-making exemplified by the Court of Appeal's decision in the case of R v Eastleigh Borough Council exp. Betts [70], where all three members held unlawful a working definition of "normal residence", as used in the Housing (Homeless Persons) Act 1977, promulgated by the Association of District Councils with the approval of the Department of the Environment).

Following on from the above theoretical discussions Chapter Three will focus upon the case study of the Awards Branch of the Scottish Education Department. The organisational situation there will demonstrate many ideal-type bureaucratic attributes including the processing of a large number of cases by a hierarchically arranged staff according to the goals of uniformity of treatment, accuracy in decision making, combined with low administrative costs. We shall be discovering how the Branch translates a broad statutory discretion to pay students educational grants into a number of distinct discretionary administrative powers which are allocated between grades of officials in the organisation; and the types of administrative guidance that are relevant to each hierarchical level of decision making. The official and unofficial limitations to the staffs' recourse to their administrative guidance will be examined, allied with the strategies implemented by senior management to prevent subordinate officers developing divergent approaches to the same provisions (e.g. training programmes and alterations in the structure of the organisation). Additionally the study will be used to indicate the link between the nature of the rules

regime governing a particular administrative scheme and the types of remedies available to aggrieved citizens regarding what they consider to be unsatisfactory decisions by officials.

In Chapter Four Davis' advocacy of the "confining" and "structuring" of official discretion via administrative rulemaking will be subjected to a critical evaluation. His ideas will then be located within their American context by an outline review of the judicial reactions to Federal Agencies' rulemaking under the Administrative Procedure Act, thereby enabling the question of their applicability to the British constitutional framework to be raised.

Taking account of the American legal approaches to administrative rulemaking, together with the practice of British administrators and the responses of our grievance agencies towards administrative guidance, the thesis will propose a general classification of guidance. In the ensuing three chapters this classification will be utilized in a systematic analysis of the jurisprudence of the P.C.A., the Courts and Value Added Tax Tribunals regarding the different classes of guidance. Distinctions between the treatment of identical classes of guidance by the three grievance agencies will be highlighted along with convergencies in reasoning and determinations. Within these broad considerations a number of detailed issues will be raised such as the lawfulness of departmental decision-making based upon administrative guidance, when and how affected citizens may challenge either the lawfulness of guidance or its application in the circumstances of their case, the situations in which the promulgators of guidance may become bound by its terms, and the significance of the publication of the contents of guidance for citizen's actions before individual grievance

agencies.

Finally Chapter Eight will provide a conclusion in which an attempt will be made to reconcile the insights gained from the organisational materials on adminstrative guidance with the attitudes of British administrative law, fortified by some suggestions of how the latter discipline should develop its responses to this phenomenon in the future.

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CHAPTER TWO

ORGANISATION THEORY AND ADMINISTRATIVE GUIDANCE

Introduction

In the eyes of Professor Peter Schuck, "the distinctive office of administrative lawyers, after all, is to mediate between the realms of legal meaning and social action."[1] While commentators both from within and out with the discipline could productively spend many hours debating the general virtues of the above statement it does accurately encapsulate the nature of this dissertation with its central theme of discovering how British administrative law presently reacts to administrative guidance and what developments in that position might be desirable and attainable. Therefore, in the next two chapters we shall consider aspects of the organisational and social environments in which administrative guidance operates so that the later analysis of the legal materials can be undertaken against a background of greater understanding of the theoretical and practical features of the phenomenon than that provided by the judicial case law alone.

As administrative guidance appears to be intimately associated with the functioning of complex organisations (for example, the compounding case outlined in Chapter One[2] demonstrated the Customs and Excise officers' guidance specifying the levels in the organisational hierarchy at which offers to compound offences could be made and the criteria to be taken into account in making such offers) this Chapter will examine several of the theories regarding organisational behaviour produced by social scientists to determine if they can add to our

comprehension of the nature and forms of guidance. Inevitably a choice had to be exercised in the selection of these theories, because of the numerous disciplines which have focussed upon the features of organisational behaviour[3]; but this was undertaken with an awareness of Campbell and Wiles warning about the dangers of "intellectual subcontraction"[4]. The ensuing discussion focuses mainly upon those sociologists who are grouped under the banner heading of "organisation theorists"[5] (due to their common concern with organisational behaviour), as the writings of these different schools of thought appeared prima facie to offer the greatest degree of relevancy and compatability with the interests of lawyers studying administrative guidance. Moreover, the former group's research often utilized case studies of governmental bodies to discuss questions of internal and external accountability, hierarchical authority and discipline. But as Evan points out such a task is not easy because, "compared with administrative law, the field of organization theory appears to be highly abstract, diffuse, and even chaotic."[6] With that caveat in mind this examination will concentrate upon those writers, and their respective schools of thought, which have influenced both their own and succeeding generations of scholars.

During the elaboration and evaluation of these theories we shall first be seeking to discover the types of conceptions developed by the theorists regarding the nature of complex organisations (that is those organisations which have features similar to central government departments e.g. large numbers of members divided into distinct 'hierarchical' grades who are engaged mainly upon administrative activities). In outlining their conceptions an attempt will be made to briefly note the major factors underlying their approaches (i.e. what were their

intellectual antecedents, to what extent have they rejected or incorporated earlier conceptions of complex organisations, and are there any trends towards convergence in these diverse images?). Secondly, regard will be given to any accounts or explanations of the forms, nature or significance of administrative guidance in the theorists' conceptions; however, these references will not be found in exactly the same terminology as that used in this thesis and therefore broadly synonymous terms such as "rules"[7], "management directives"[8] and "formal communications",[9] must also be taken account of in our analysis. Finally the following investigation will be attentive to any possible categorisations of administrative guidance by the writers which might be of value to administrative lawyers. Now our objectives have been stated we can turn to an intellectual chronology of the various schools' relevant ideas.

(a) Max Weber

It is probably no exaggeration to say that Weber provided the foundation for modern sociological analysis of complex organisations in his elaboration of one type of sophisticated organisation - the bureaucracy. Reflecting his place in the tradition of universalist scholars, he expounded upon bureaucratic

organisations from a number of diverse perspectives, including, their historical origins, the social status of members of bureaucracies and the threat they posed to popular democracy.[10] However, for the purposes of this chapter his most interesting considerations of bureaucracy are to be found in his value free sociological writings, as opposed to his political observations on the development of bureaucratic entities in early twentieth century, post-Bismarck Germany. The breadth of Weber's writings,

combined with only a partial translation of the totality into English, may account for the tendency of commentators to locate his sociological thoughts upon bureaucracy in two distinct analytical frameworks. First Albrow[11] together with Clegg and Dunkerley[12] discuss his treatment of bureaucracy in terms of an explanation of the generic concept of Verband ("organisation"), that is social entities composed of leaders, administrators and members whose functions range from religious activities to business enterprises. The second approach is to analyse bureaucracies qua public administrative bodies within a systematic classification of forms of political authority; this framework has been utilized by Bendix[13], Blau and Scott[14] and Mouzelis[15] amongst others. In the light of this work's orientation the latter exposition is to be preferred because there Weber was directly addressing his mind to the particular constitutional characteristics of public administrations; additionally this conceptual analysis has the advantage of direct translations to aid our comprehension.[16]

Weber stated that in all situations of "domination" political leaders sought to promote an acceptance of their rule, by the ruled, via the cultivation of a belief in its legitimacy. He then defined three forms of legitimation each of which possessed its own unique type of administration. "Charismatic" authority was the product of the leader's personal qualities of "sanctity, heroism or "exemplory character" and as a consequence these often temporary mass movements had unstable and ill-organised administrations; "Traditional" authority reflected the inherited respect granted to a certain office, normally that of a Monarch. In this system of socio-political relations Weber detailed two forms of administration, firstly the "Patrimonial" where the administrators were friends or servants of the ruler and

therefore depended on his goodwill, and secondly the "Feudal" in which case the administrators were influential individuals who possessed power in their own right and by a contract with the ruler exercised their powers on his behalf. Finally in the third form of legitimacy, which most closely resembles Western constitutional states[17], it was a form of the Rule of Law concept which provided justification and support for the ruler's determination. In Weber's words legitimacy rests there,

> "... on a belief in the 'legality' of patterns of normative rules and the rights of those elevated to authority under such rules to issue commands... obedience is owed to the legally established impersonal order."[18]

Under that system he detailed increasingly "rational" forms of administration which will now be considered.

The most elementary, and therefore least rational, type of administration was that of immediate democratic administration where there were no full time administrators; instead the members of the society implemented their own common rules as in the early Swiss Cantons and New England Townships. Once the society became larger and more heterogeneous a second type of administration emerged which was staffed by "honoratiores"; these were persons whose economic position gave them the time and prestige to act as quasi-permanent administrators. However, as the tasks of administration become qualitatively and quantitatively more complex the bureaucratic administrative organisation developed. Weber never precisely defined this type of organisation, although he referred to it as "a continuous organization of official functions bound by rules."[19] But he did set out the characteristics of the most advanced kind of bureaucracy - the Monocratic. These included, inter alia; a

hierarchy of offices; each office having clearly defined authority; officials selected on the basis of technical qualifications; on appointment their office becomes their main occupation; the offices operate on the basis of written rules and documents; impersonality governs the relations between offices - the bureaucracy and the political ruler - the bureaucracy and the ruled; there are career prospects within the bureaucracy and the officials are remunerated by salaries. Albrow notes of this ideal-type construction that it is, "without doubt the single most important statement on the subject in the Social Sciences, its influence has been immense".[20]

The first question raised by Weber's analysis above is what did he mean when he wrote of the "rationality" demonstrated by bureaucratic administrative organisations? Some indication is provided by his observation that,

> "the fully developed bureaucratic mechanism compares with other organizations exactly as does the machine with the non-mechanical modes of production."[21]

As a result the majority of subsequent writers have taken rationality to mean efficiency. Hence Mouzelis argues, "an ideally rational organisation in the Weberian sense, is an organisation performing its tasks with maximum efficiency."[22] This interpretation accords with the ideal Constitutional view of bureaucracies contained in Weber's analysis where they are seen as mere tools of their political masters, concerned only with achieving their pre-set goals with the greatest speed and at the least cost. But it has been disputed by Albrow who contends that, "at the heart of Weber's idea of formal rationality was the idea of correct calculation, in either numerical terms as with

the accountant or in logical terms, as with the lawyer."[23] To Albrow therefore, the central element in rationality was the regular and measured application of the offical's appropriate technical knowledge to the problems confronting the organisation. Perhaps it is possible to attempt a reconciliation of these two interpretations by suggesting that decision-making based on the consistent use of technical information and skills is one method by which policy objectives may be achieved and hence it is a hypothetically low cost - maximum return, i.e. efficient, strategy with the consequence that Albrow's interpretation is merely a narrower form of the majority's view. Therefore in accepting rationality as equivalent to efficiency Weber was conceptualising bureaucracy as the most efficient form of public administrative organisation to have been developed by mankind.

Our next task is to consider what component parts of Weber's conception enabled this hypothetical efficiency to be achieved. Undoubtedly one element of the equation was the officials' knowledge of both the policies to be implemented and the skills necessary for the smooth operation of the administrative process, which were gained through a combination of pre-entry education and subsequent work experience. But as Bendix explains a second factor operated in symbiosis with the possession of expert knowledge by the members of the bureaucracy and that was a body of rules which governed the application and use of the organisation's collective knowledge:

> "the technical superiority of bureaucratic administration therefore depends on its orientation towards impersonal rules that enhance the uniform reliability and hence calculability of its operation."[24]

Similarly Mouzelis reveals that within Weber's bureaucracy,

> "one finds a common, all pervasive element, the existence of

> a system of control based on rational rules, rules which try to regulate the whole organisational structure and process on the basis of technical knowledge and with the aim of maximum efficiency."[25]

Unfortunately Weber did not give much attention to an elaboration of the nature of these rules and restricted himself to stating that they "may be technical rules or norms"[26]. His editor Parsons simply suggests that the former type are concerned with matters of efficiency whilst the others are not.[27] Albrow by contrast interprets Weber's categories as corresponding to technical and legal rules.[28] The difference between these two commentators' positions may not be great, because "norms" and "legal rules" both imply commands having their origins outside the bureaucracy itself. This is in accordance with Weber's analytical framework where the administration is subject to a political sovereign's will and a Constitutional system operating under the Rule of Law. On the other hand "technical rules" suggests control of officials by expert knowledge and as Weber believed,

> "bureaucratic administration always tends to be an administration of 'secret sessions', in so far as it can, it hides its knowledge and action from criticism."[29]

This may indicate that such technical knowledge can only be possessed by other officials of the same bureaucracy thereby giving these rules an internal dimension. However, it is probably fruitless to continue speculating over the functional and legal nature of these rules as perceived by Weber, because in the above writings he was not primarily interested in this aspect of his conception of bureaucracy but was utilizing it as a classificatory device for forms of political domination and their associated administrative structures.

To conclude this brief examination of Weber's bureaucracy it

must be noted that in his view rules play a central and strategic role in shaping the nature of the organisation and its achievement of rational decision-making. The rules appear to have origins both within (technical rules) and outside (norms/legal rules) the organisation, and regulate internal relations between officials together with external interactions involving the political sovereign and the individual members of the society. It is the internal rules of the bureaucracy which enables the collective wisdom of the organisation to be applied dispassionately, impersonally and consistently with the consequent outcome of rational administration. However, we must appreciate that Weber's analysis was presented within an ideal-type format so as to enable reality to be evaluated against a theoretical conception of a complex administrative organisation. As Blau and Meyer observed of Weber's concept, it was "a pure type, derived by abstracting the most characteristic bureaucratic aspects of all known organisations".[30] Therefore, as the ideal-type was articulated within an environment of perfect co-ordination and balance between the constitutional elements of sovereign, administration and citizens, with an absence of human emotions affecting these relationships, it is clear that Weber's framework must not be treated as an actual blueprint for contemporary society. But it was inevitable that subsequent writers would seek to examine the extent to which elements of Weber's concept of bureaucracy could be applied to existing complex organisations, and also to question the logical integrity of his ideal-type construction. Regarding this former development of Weber's analysis we shall now engage in an overview of the scientific, and Human Relations, schools of thought.

(b) The Scientific School

As this expository sketch will reveal, the nomenclature assigned to the school by its founder Frederick Winslow Taylor nowadays appears rather ironic. However, these writers merit inclusion in our examination as they represent the next phase in the evolution of organisation theory. The members of the school all possessed vastly different intellectual backgrounds from that of Weber, with their common heritage being a successful managerial past. Furthermore their orientation was distinct from his in that they were concerned with promoting the efficiency of individual organisations in the real world. But despite these significant differences they appropriated elements of Weber's ideal-type and principles of organisational construction. In Self's words, the "traditional theorists tended to regard staff as so many 'hands' or 'brains', who would respond predicably to well desired rules or to economic incentives".[31] Consequently Taylor and his successors unquestioningly promoted the idea that large commercial organisations were composed of hierarchically arranged groups of workers, who lacked personal feelings and could be as easily manipulated by trained managers in the interests of increased profitability as pieces of capital equipment.

Taylor[32] produced a synthesis of techniques for managements to measure the activities of their shopfloor workers via time and motion studies which he considered provided a scientific foundation for the designing of organisational forms, hence his choice of title for this school. In his analysis the major sanction available to management for the control of their subordinates' behaviour was that of economic rewards. Henri Fayol[33] expanded the ambit of the above approach by arguing that the administrative portion of large organisations could also

be subject to systematic examination for the purpose of introducing the most efficient structures. Derived from his years in business management he proposed a series of intuitive principles, such as the need to develop an esprit de corps, which were directed at creating, "...the kind of formal structure that the head of a firm should develop as an instrument of his will."[34] Subsequently Gulick and Urwick[35] sought to apply similar "scientific principles" distilled from successful business organisations to the functioning of public administrative bodies. However, they adapted their predecessors' reliance on economic incentives to control subordinate members' behaviour by stressing the importance of disciplinary rules in these types of organisations where remuneration was based on the grade of office held rather than on material outputs.

Although Subramaniam[36] has devastatingly criticised these writers for their "unsophistication" regarding the nature of organisational structures and behaviour, together with their "bias" in favour of a managerial perspective upon life in complex organisations, even in recent times their views have continued to receive influential attentiveness (e.g. from the Fulton Committee on the Civil Service).[37] Nevertheless from our perspective the significance of this school's contribution to organisation theory was less in the substance of its members' principles and techniques of scientific management than in the shift towards empirical investigations into organisational behaviour that they prompted.

(c) The Human Relations School

While this school of thought was eventually to spawn many distinct offspring they all originated from the research undertaken at the Western Electric Company's Hawthorne plant

during the late Nineteen Twenties. According to Clegg and Dunkerley[38] this investigation into workers' motivations was undertaken because production methods based on the Scientific School's ideas had started to result in the alienation of the labour force, therefore management was looking for new strategies to regulate their employees' productivity. Between 1927-1932 Elton Mayo supervised the inquiries undertaken by Roethlisberger and Dickson, which involved observation and survey questioning of different sections of the workforce. The eventual results of the study suggested that the workers' motivations were far more catholic than the simple material avarice assumed by the scientific writers. As Brown and Steel concluded,

> "the human relations school forced organisational theorists to recognise the importance of private and group objectives[39]."

Secondly the Hawthorne data demonstrated the diversity of behaviour at the work group level, with the "bank wiring room" personnel's activities achieving academic immortality. At a more general level of analysis these results indicated the narrowness and incompleteness of the Scientific School's conception of organisational behaviour, where individuals were essentially conceived as malleable components in a large machine.

Subsequently the above discoveries have been incorporated within the concept of the informal organisation which Mouzelis describes as referring,

> "...to values and to patterns of behaviour which are not instigated by formal rules and policies but arise naturally from the interaction of people working together."[40]

Therefore, the Human Relations School's major contribution to the

body of knowledge possessed by organisation theory was to provide the tentative empirical and conceptual basis for an understanding of the actual social reality found within complex organisations. However their enunication of the concept of the informal organisation must be comprehended with regard to the following caveats. First, the behaviour which constitutes the informal organisation can only occur within the context of a set of deliberately created social relationships, i.e. the formal organisation, as it is in reaction to the latter relationships that the former develops; consequently the informal organisation is a complementary not a substitute concept to the formal organisation.[41] Secondly, from the sociological perspective there is the great danger of commentators adopting a normative position when contrasting these two conceptual views of the organisation, in that either the behaviour amounting to the informal organisation is perceived as deviant from that prescribed by the formal organisation's rules, or the informal organisation is seen as the actual social organisation and the formal one a mere myth. But as Blau and Scott observe,

> "the distinction between the formal and informal aspects of organizational life is only an analytical one and should not be rigid; there is only one actual organization".[42]

Within the next section we shall examine how the conceptual analysis of complex organisations in terms of the relationship between their formal and informal parts has developed since the discoveries of the Human Relations writers.

(d) The Post-Weberian School

This group of researchers began their theoretical and empirical investigations into the nature of complex organisations in the years following upon the ending of World War Two. They

warrant their designation because all the members observed Weber's approach to sociological research by attempting to provide a value free analysis, which was in contradistinction to the one-sided attitudes of the Scientific and Human Relations Schools. However, their level of analysis differed from that of Weber's, as the members of this school concentrated upon the individual organisation, hence the reliance on the case study in their research publications. Furthermore, although this school utilized their intellectual ancestor's ideal-type of bureaucracy in their examinations of specific organisations, they did not do so uncritically. Indeed the work of this school began with a theoretical challenge to the logical integrity of Weber's ideal-type which we shall now consider.

The modern progenitor of this school was an American sociologist, Robert Merton, who suggested that when Weber's ideal-type of bureaucracy was transferred into the actual living world it might have serious dysfunctions. He hypothesised that certain fundamental structural features of Weber's ideal-type, notably the strict discipline and career prospects which were designed to ensure consistency in behaviour, might in practice encourage the officials to adopt non-rational forms of decision-making. In his words,

> "Adherence to the rules, originally conceived as a means, becomes transformed into an end in itself; there occurs the familiar process of displacement of goals whereby 'an instrumental value becomes a terminal value'... This may be exaggerated to the point where primary concern with conformity to the rules interferes with the achievement of the purposes of the organization, in which case we have the familiar phenomenon of the technicism or red tape of the official."[43]

Therefore, he proposed further empirical research into the effects of bureaucracy upon personality in actual organisational settings.

Peter Blau took up Merton's hypothesis in his investigation into a state employment agency and a Federal Law enforcement body. But he came to the conclusion that it was not the structure of bureaucracy per se which encouraged goal displacement, but the presence of insecurity within the organisation. To him,

> "these findings suggest that ritualism results not so much from overidentification with rules and strong habituation to established practices as from lack of security in important social relationships in the organization."[44]

He also found from his case studies that, "...officials who have most fully incorporated the existing normative structure into their own thinking can most easily depart from it."[45] These findings lead to the conclusion that actual organisations with structures resembling Weber's ideal-type are capable of producing well adjusted and secure officials who may be just as likely to seek the achievement and positive succession of goals as they are to decline into the negative pattern of goal displacement. The other important theme of Blau's book is that bureaucratic organisations contain perpetually dynamic social processes. From his researches he determined that,

> "the only permanence in bureaucratic structures is the occurrence of change in predictable patterns; and even these are not unalterably fixed".[46]

These patterns amounted to a never ending series of actions and re-actions between those senior members of the organisation who sought to control the activities of their subordinates by formal rules and the latter's reaction to such rules. He classified the subordinates' behaviour as "adjustment" when they pursued the goals of the formal rulers by different but more effective means, or "redefinition" when they used the procedures

established by the rules for ulterior objectives, with the superiors responding by "amplification" of their original rules to take account of the "adjustment" or "redefinition" which had occurred and thereby initiating the cycle again. Consequently Blau concluded, "perfect adjustment is hardly possible, because the very practices instituted to enhance adjustment in some respects often disturb it in others".[47]

Michel Crozier continued the study of the internal dynamics of bureaucratic organisations by emphasising the distribution of power between entities within the membership because,

> "the behaviour and attitudes of people and groups within an organisation cannot be explained without reference to the power relationships existing amongst them".[48]

He based the above assertion on his investigation into the nature of social relations within the French state tobacco monopoly, which demonstrated an extremely centralised structure with the head office in Paris seeking to regulate all significant decisions at production plant level via managerial directives and rules. Crozier discovered that at the factory level the group of workers

who could best control the areas of uncertainty left untouched by the central directives exercised de facto power over other workers, who might be above or below them in the formal organisational hierarchy. In fact it was the machine maintenance men who had helped create, and then controlled, the largest source of remaining uncertainty which involved equipment breakdowns. This group then used their de facto power to extend their hegemony over the production workers and lower supervisors together with invoking it as a method of insulation from managerial control. Consequently Crozier was revealing a conflictual model of bureaucratic relations in which,

> "every group fights to preserve and enlarge the area upon which it has some discretion, attempts to limit its dependence upon other groups and to accept such dependence only insofar as it is a safeguard against another and more feared one, and finally prefers retreatism if there is no other choice but submission".[49]

There he demonstrated the increasing maturity of the sociological study of organisations compared to the earlier Scientific and Human Relations schools work, where ideological biases prevented them from acknowledging that such internal conflict could exist within bureaucracies.

For the purposes of this chapter the relevant link between the analyses of Crozier and Blau is that they both see the formal rules of the organisation as establishing the boundaries to the informal processes of the members. In Crozier's study the central directives attempted to confine plant discretions which in turn provided the battlefields for inter group power struggles, whilst in Blau's case studies the evolving cycles of amplification, redefinition, adaptation, amplification etc. revolved around the rules promulgated by senior management. These analyses thus demonstrate the enduring significance of rules within the operations of complex organisations whilst drawing our attention to some of the other strategic internal social forces impinging upon those rules and to their frequent alterations in the intended effects of the rules. However, the range of these forces combined with their different permutations between distinct organisational settings, and over time, means that this school is unable to produce a model of organisational behaviour which will allow any form of prediction about the likely effects of specific rules governing particular bureaucracies.

Yet even the analyses of organisational life presented by the

above writers do not reflect the full complexity of bureaucratic administration according to this school, because they omit any discussion of the external forces interacting with the relevant organisation. Therefore it was left to Philip Selznick in his classic study of the Tennessee Valley Authority to demonstrate the importance of the social environment in which an organisation existed. He examined the ways in which the Authority adapted its programmes to the demands of influential groups, such as the pre-existing large wealthy farmers, in order to strike a balance between the formal authority of the administration and the power possessed by these groupings. For him the mechanism of "co-optation", which he defined as, "...the process of absorbing new elements into the leadership or policy-determining structure of an organization as a means of averting threats to its stability or existence,"[50] was central to the Authority's ability to reach accords with potentially hostile external bodies. Consequently Selznick's study indicates that if we wish to gain an accurate picture of the totality of social forces influencing organisational behaviour, attention must be paid to external as well as internal factors.

To summarise the findings of this school which are most relevant to our enquiry, we can begin by noting that when the researchers transferred elements of Weber's ideal-type bureaucracy into the real world, where individuals possessed emotions and conflict was present within and outside organisations, they discovered that the use of disciplinary rules to govern subordinate officials' decision-making did not necessarily lead to Merton's suggested dysfunctioning. Secondly, and on a related theme, their case studies demonstrated that the informal processes of the organisation did not automatically present a threat to the rationality/efficiency of bureaucracies

as they might encourage the increased achievement of formal goals, e.g. via Blau's "adjustment", instead of undermining the rationality of bureaucratic administration. Consequently judgments regarding the effects of informal processes on organisational functioning can only be made for individual organisations. Furthermore, because these research findings reveal the dynamic nature of social relations within bureaucracies, determinations on the effects of informal process are only valid for the time period during which the examination was undertaken. Thirdly, derived from the researcher's need to utilize the case study method in order to ascertain the multitude of factors affecting organisational behaviour, difficulties arise concerning the ability to deduce general theoretical insights from widely differing examples. However, by indicating the staggering complexity of behaviour within a heterogeneous collection of bureaucratic organisations, this school's work provides lawyers with a vivid warning of the difficulties they face in trying to regulate public bureaucracies with the institutions and doctrines presently at their disposal.

From the schools of thought discussed so far we have seen a variety of approaches to the study of organisations. Therefore, to conclude this review consideration will be given to the ideas of two theorists who each claimed to have produced grand integrating concepts of organisations which overcame the intellectual limitations of the earlier schools.

(e) Simon and Decision-Making

Herbert Simon claimed [51] that his conceptualisation of administration as decision-making had its eclectic origins in Weber's ideal-type bureaucracy, the Human Relations school's articulation of the informal aspects of organisational behaviour

and Chester Barnard's theories regarding incentives in public administration. He believed that administrators were primarily concerned with decision-making, but undertook this task with "bounded rationality" as they generally possessed incomplete knowledge and only sought to reach decisions that were satisfactory to their superiors, rather than strive for those which maximised the attainment of the administration's goals. The function of the administrative organisation in this scheme was to provide the structural support for decision-making, by creating an environment conducive to rationality; this was achieved via external influences upon the individual administrator (e.g. the exercise of authority by superiors) and internal conditioning (e.g. through training). Central attention was given to the organisation's role in creating a comprehensive communications network between the various levels and members of the administration. In Simon's own words,

> "... the administrative processes are decisional processes; they consist in segregating certain elements in the decisions of members of the organization, and establishing regular organizational procedures to select and determine these elements and to communicate them to the members concerned."[52]

These processes were of two types, formal and informal. The former category was composed of formal rules in the guise of memoranda, files, records and manuals, whose purpose he defined thus, "the function of manuals is to communicate those organization practices which are intended to have relatively permanent application."[53] The category of informal communications clearly demonstrates how Simon was attempting to synthesise existing approaches towards organisations within a new framework, which in this instance fused the ideas of Weber and the Scientific school with those of the Human Relations

51.

researchers. As Simon declared,

> "no matter how elaborate a system of formal communications is set up in the organization, this system will always be supplemented by informal channels... the informal communications system is built around the social relationships of the members of the organization".[54]

One outcome of Simon's theory was the revitalisation of the significance given to the formal organization and its methods of affecting officials' behaviour, compared to their nadir in the eyes of the early Human Relations writers. Hence Simon considered that junior officials should have their decision-making guided by direct constraints, eg. instruction manuals (which followed the ideas of Weber and the Scientific School); but these were to be supplemented by other techniques, such as training courses, whose usefulness was derived from the recent discoveries regarding the informal needs and behaviour patterns of officials within bureaucracies. However, Simon's concept of the administrative organisation as a decision - making structure also presents a number of difficulties of both a theoretical and practical nature. In the first category the danger of over-emphasising one aspect of organisational life with a consequent reduction in the attention given to other facets threatens the validity and utility of Simon's analysis, just as individual members of the Post-Weberian school risked similar criticism for their concentration on particular social forces, eg. Blau on dynamics and Crozier on power. For example, in his evaluation of Simon's theory Self observed that, "rules of organization are viewed as no more than flexible devices for producing satisfactory decisions"[66], yet not all the rules created by a complex organisation are directly concerned with structuring administrative decision-making (to take an extreme

example, the Civil Service guidance which specifies the office facilities and furniture available to the varied grades of civil servants). Secondly it has been claimed that Simon's purported description of an administrator is not accurate as, "it postulates a degree of open-mindedness, and a readiness to explore the costs and consequences of alternatives which cannot realistically be postulated of an executive, whether he be a politician or career official."[56] The implication is that Simon's analysis is based upon normative rather than descriptive assumptions.

Simon sought to integrate a variety of ideas regarding organisations through focusing upon the individual decision maker; in our final examination of attempts to produce general synthesising theories we shall consider the systems concept which operates at the opposite extreme with a high degree of generality.

(f) Parsons and Systems Theory

This chapter has already obliquely referred to the major theorist in this school, Talcott Parsons, through his translation and editorship of one of Weber's works. In his important article on organisations Parsons sought to apply some of the general categorisations and theoretical insights developed by sociology to this particular field of study, with the objective of providing an analytical framework that was capable of encompassing all forms of organisations in diverse societies. To that end he conceived the organisation,

> " ... as a social system composed of various subsystems (groups, departments etc.) and embedded within wider social

systems (community, society)".[57]

Although Parsons did not explicitly define the meaning to be ascribed to "social system" in this particular piece of work, he presumably intended it to have its general sociological usage which Clegg and Dunkerley give as "a description of a group of phenomena that is interdependent in such a way that it carries out some task or strives to achieve a common goal".[58] He considered that all social systems had to satisfy four functions if they were to survive, these were "adaptation", "implementation", "integration" and "pattern maintenance". In the context of organisations Parsons stated that adaptation involved acquiring and processing the traditional economic factors of production (viz. land, labour and capital); implementation meant devising strategies for the achievement of the organisation's goals; integration the co-ordinating of actions and settling of disputes; and finally pattern maintenance covered the application of general social values (e.g. moral or cultural) to internal and external organisational relations. These different functions were allocated between three levels within the organisation - the "technical", being composed essentially of manual operatives, were responsible for adaptation; the "managerial" dealt with implementation and integration, whilst the "institutional" which covered groups such as boards of directors tackled pattern maintenance.

Parsons believed that one virtue of his analysis was that it enabled the above classifications to be used to examine the link between individual organisations at the next level of generality - the societal. Hence,

> "it seemed appropriate to define an organisation as a social system which is organised for the attainment of a particular type of goal; the attainment of that goal is at the same time

> the performance of a type of function on behalf of a more inclusive system, the society".[59]

So he was using the concept of a social system in a manner analogous to a set of Russian dolls, with society representing the largest doll and the individual organisation one of the smaller dolls. Each organisation had to satisfy all four functions upon which the existence of a social system depended, but from the perspective of the highest order social system - the society - individual organisations could be classified according to which one of the four tasks they were performing on behalf of that social system. Consequently Parsons considered adaptational activities would be undertaken by business organisations; implementational via governmental organisations; integrative through conflict resolving organisations (such as the courts) and pattern maintenance through cultural organisations (e.g. the churches). Subsequently Parker and Subramaniam have developed this analysis as a suggested basis for distinguishing between "public" and "private" administration which they consider superior to the traditional instrumental theories of public administration. They believed that public bodies could be separated from other organisations in society through their specialisation "in the process of integration and allocation for the society as a whole"[60], which naturally gave them a pre-eminent role in regulating the activities of other organisations.

In Mouzelis' opinion the analysis produced by Parsons had the advantages of encompassing the various levels of social action within individual organisations from the work group, as studied by the Human Relations researchers, to the whole organisation, which was the domain of the Post Weberians.

Furthermore the systems approach took cognisance of the external environment surrounding individual organisations by examining their relationships with other organisations and the society as a totality. However, the co nverse aspect of these achievements is reflected in Blau and Scott's criticism that Parsons'

> " ... extremely abstract conceptions yield a theoretical scheme devoid of a system of propositions from which specific hypotheses can be derived; in short, he has only developed a theoretical framework and not a substantive theory."[61]

While that conclusion may not invalidate the general value of Parsons' work it buttresses our disappointment that he did not discuss the role(s) of rules within the various levels of social systems incorporated in his analysis; presumably the omission was required by the generality of his coverage but the willingness of the other schools of thought to tackle the issue needs to be borne in mind.

Conclusion

In this section of the chapter we shall try and answer the three questions posed at the beginning concerning the theorists' ideas on complex organisations and the relevance of administrative guidance for understanding organisational behaviour, together with establishing some tentative suggestions regarding administrative law's future response towards administrative guidance derived from the work of these writers.

The first question we raised was how did the theorists conceive of complex organisations in conceptual terms? Undoubtedly the short answer is - with diversity, because the

different schools of thought viewed such organisations as, inter alia, human machines, decision-making bodies and social systems. These varied concepts were the product of the divergent orientations and levels of analysis utilized by the theorists, with the consequence that the separate schools of thought based their conceptions on distinct perspectives which both revealed and concealed a range of facets of organisational life. Regarding the orientation of the theorists towards the study of organisations, Weber and the Post-Weberians believed that the researcher should suspend his normative beliefs and seek to create a value-free analysis of the particular organisation being studied. In contrast the scientific school and Human Relations writers possessed unashamedly pro-managerial attitudes which at first prevented them from accepting the social needs of junior members of bureaucracies and then later limited their ability to incorporate the notion of conflict within their concepts of organisations. As for the different levels of analysis chosen by the theorists they covered the spectrum from Parsons and Weber examining organisations at the societal level, to Simon concentrating upon the individual decision maker within an administrative organisation. Between these extremes the Post-Weberians together with the Scientific school focussed upon the single organisation, whilst the Human Relations researchers preferred the work group level. Therefore, recognising these different research perspectives, we must acknowledge the impossibility of integrating such heterogeneous concepts within any synthesising theory on the nature of complex organisations.[62] Simon does not provide such a theory through the narrowness of his decision-making approach and Parsons does not, due to the abstractness of his systems theory. However, it is possible to discern several common elements in the various

conceptions articulated by the different schools of thought. One standard component is that of a hierarchically arranged structure with those members in the highest grades having formal authority over those below them in the hierarchy. Weber, the scientific school, the Post-Weberians and Simon all incorporated this feature within their distinct conceptions. Furthermore, from the Human Relations school onwards, the theorists sought to incorporate the characteristic of dynamics into their images of complex organisations; hence it was no longer permissible to view the organisation solely in terms of the formal hierarchy of authority, but internal struggles for power and independence were acknowledged, along with external influences upon organisational behaviour. Consequently the theorists demonstrated the continual need to widen the scope of social forces included within the analysis in order to produce an accurate picture of organisational life. This trend towards extending the variables considered by individual theorists has had a profound effect upon their treatment of administrative guidance as we shall discover next.

The second question asked at the beginning of this chapter was concerned with the nature and significance of administrative guidance (or its equivalent) in the theorists' conceptions. We can now answer that all the theorists with the exceptions of the Human Relations School and Parsons made specific references to administrative guidance (usually in the form of internal rules and instructions) in their analyses. This reflects their collective view that administrative guidance was a significant factor affecting individuals' behaviour within complex organisations; additional weight is given to that conclusion when we take into account the variety of orientations and levels

of analysis adopted by the theorists with the majority still incorporating aspects of administrative guidance into their distinct concepts. Furthermore, their conceptions revealed a degree of commonality of treatment towards administrative guidance, with the phenomenon being closely associated with the hierarchical nature of complex organisations as senior members of the organisation utilized it to regulate the behaviour of subordinates in order to attain the formal goals of the organisation in more rational ways. For Weber and the Scientific School administrative guidance in the guise of rules contained commands from the senior staff to the junior members, whereas Simon broadened the idea of formal communications beyond superiors' orders into the realms of regulation by education and information conveying.

However, as organisation theory has evolved the theorists have sought to comprehend and explain the totality of behaviour patterns discovered within organisations and therefore they have increased the range of social variables influencing these patters recognised by their analyses. One consequence of this development has been a reduction in the prominence given to administrative guidance in the later conceptions. Hence, Weber in his ideal-type bureaucracy conceived of rules as the basic method of regulating officials' behaviour. Inter alia, they established the duties of individual officials, specified the relationship between officials throughout the hierarchy and determined the manner in which officials were to interact with members of the public when engaged upon governmental business. Subsequently the Scientific School in their somewhat authoritarian concept of the organisation machine viewed economic incentives and disciplinary rules as the two major mechanisms

for controlling subordinate staff. But by the era of the Post-Weberians the researchers' attentions were captivated by the informal aspect of organisational life, with their case studies emphasising these hitherto relatively neglected behaviour patterns. Therefore the features of internal rules tended to be taken for granted, whilst the intellectual spotlight was cast upon intra and inter organisation struggles, the pursuit of individual and group objectives, and the process of constant change in the social relations between members of the organisation. Simon did reiterate the importance of the formal organisation and its rules in his writings, but there they were subsumed, along with virtually all other characteristics of organisational life, by the function of decision-making.

From the discussions above we can conclude that, almost irrespective of the way in which complex organisations are conceptualised, what this thesis calls administrative guidance forms an elementary component of the concepts thereby produced because of its prevalence and significance in the functioning of actual bureaucracies. Nevertheless we have learnt from the Human Relations School that organisation theorists no longer consider it accurate to comprehend the organisation purely in terms of its formal structure. Therefore, as administrative guidance is undoubtedly the product of deliberate human effort and consequently a part of the formal organisation, behaviour patterns in bureaucracies cannot be explained solely by reference to administrative guidance. Accordingly the Post Weberians' analyses of their individual case studies seek to demonstrate that one cannot expect actual officials to unquestioningly follow the administrative guidance promulgated

by their superiors (unlike the assumptions of Weber and the Scientific School), nor is it possible to predict the practical effects of administrative guidance upon officials by only considering the formal distribution of authority within the organisation. Consequently, from that perspective, if we wish to discover how existing administrative guidance really affects particular civil servants we must conduct our own empirical investigations. These findings are of potentially great relevance to lawyers trying to understand the implications of administrative guidance for contemporary judicial and other grievance handling agencies' reactions to the phenomenon. Therefore, after seeking to answer the third question posed of our examination into the writings on organisation theory, we shall conclude this chapter by considering how these writings should influence both our future research on administrative guidance and the attitudes of administrative law to it.

Our third question was directed at discovering if the organisation theorists had produced any classifications of administrative guidance which might enlighten administrative lawyers on the nature of the phenomenon. Unfortunately for us the succinct answer is no, as the above theorists did not consider this issue a fundamental one from the orientations of their analyses. Understandably, in the light of our previous deliberations, the Human Relations and Post-Weberian schools of thought concentrated upon the informal as opposed to the formal aspects of organisational life thereby restricting any discussion of the forms taken by formal rules. Moreover, the other theorists who dwelt upon the formal organisation were governed by the objectives underlying their conceptions, hence Parsons' desire to provide an integrating analytic framework

resulted in his adopting a degree of abstraction which prevented any evaluation of administrative guidance and similarly the Scientific School's aim of creating universal principles to regulate the construction of organisational structures diverted their attention away from the forms of administrative guidance found in complex organisations. As we discussed earlier in this chapter Weber's purpose of utilizing his ideal-type bureaucracy to distinguish between different administrative organisations meant that he did not expand on his observation that the rules regulating officials were either "technical rules or norms". Furthermore Simon's concept of decision-making meant that in his writings all types of administrative guidance were subservient to that activity; however, the fact that he considered "formal communications" to be composed of inter alia, manuals, memoranda and files, is important for our definition of administrative guidance (cf Chapter One) because it reaffirms both the diversity in physical forms of these provisions, together with their varied contents ranging from specific rules, to texts explaining the objectives of particular administrative schemes to junior officials.

We must conclude our answer to question three by noting that the assumptions underlying the question over-optimistically expected the organisation theorists to possess similar interests to those of administrative lawyers and therefore to embrace co-extensive quests. Additionally, as we shall discover later (see the Prelude to Chapter Five), to create a classification which seeks to clarify the responses of the legal system towards administrative guidance requires a fusion of organisational and legal insights which it would be unreasonable to expect of the organisational theorists.

Turning finally to the general implications of the theorists' ideas for this research we should note that despite the range of concepts regarding the nature of complex organisations produced by the distinct schools of thought, the majority of the members examined reserved a place for administrative guidance in their analyses, thereby reflecting their common acceptance of its significance as an important factor affecting behaviour within such organisations. Therefore, we can argue on the basis of this widespread recognition of administrative guidance that it represents a fundamental feature of bureaucratic administration and that so long as central government departments demonstrate features resembling this form of organisational structure (i.e. large numbers of staff, ordered hierarchically and formally working towards the attainment of official goals) these provisions will need to exist as one of the basic regulators of officials' behaviour. Consequently if British administrative law is going to provide effective and workable remedies for citizens who are aggrieved about the ways in which civil servants' conduct governed by administrative guidance, has affected them, it must accept the inevitability of the existence of such guidance and direct its energies to elaborating principled responses to the phenomenon. This development is not only required because of the practical demands of enabling the redress of citizens' legitimate grievances, but is also mandated by the theoretical necessity for administrative law to encompass the range of norms currently regulating official decision-making.[63] The legal reaction must be clearly developed so that citizens can know inter alia what types of guidance are acceptable to the law and what forms are not, the different grounds for challenging the legality of guidance, and the circumstances in which legal enforcement of

guidance is possible. Furthermore taking account of the Post-Weberians' disclosures regarding the subtleties of organisational dynamics and the complex roles of administrative guidance within those processes it would be unreasonable to expect all the grievance handling agencies to be capable of achieving similar penetrations into the details of the actual administrative process; but these institutional limitations should not prevent the Courts, the P.C.A. and Tribunals from operating within a common appreciation of the nature of administrative guidance nor even of evolving related responses to the different types of guidance.

Although we have argued above that many of the writings discussed in this chapter have acknowledged the importance of administrative guidance as a factor governing organisational behaviour, the findings of the Post-Weberian school also revealed that it is only possible to assess the degree of influence exerted by specific guidance on particular officials by conducting wide ranging field studies into the relevant bureaucracy's operations. As British administrative law desperately needs such information in order to enlighten itself regarding the forms, uses, and intra departmental attitudes towards guidance the next chapter will present the results of a modest investigation into one department's utilization of administrative guidance.

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CHAPTER THREE

STUDENT GRANTS IN SCOTLAND : A CASE-STUDY OF A GOVERNMENTAL PROGRAMME'S USE OF ADMINISTRATIVE GUIDANCE

Introduction

In the previous chapter we saw how many of the organisation theorists incorporated those provisions which this thesis terms administrative guidance, into their diverse conceptions of bureaucratic organisation. A degree of congruence was detected in their treatment of the phenomenon when a comparative examination revealed that Weber, the Scientific School, Post-Weberians, and Simon, all viewed administrative guidance as a device for regulating officials' behaviour in order to secure the efficient achievement of the organisation's goals. However, in the light of the Post-Weberians' discoveries regarding the complexities of actual behaviour within bureaucracies caused by the continual reactions between formal and informal processes, it became clear that to go beyond the above generalised explanation of administrative guidance necessitated empirical investigation into the features, forms and effects of these provisions as found in present day central government administration. Therefore, this chapter contains the results of a fieldwork case-study[1] into the Scottish Education Department's operation of the students' Allowances Scheme (hereafter for brevity referred to as

the Scheme) which disclose, inter alia, the tasks assigned to administrative guidance by the Department; the nature of their guidance; how the different grades of civil servants reacted to it; the extent to which the guidance affected the outside world; and how dissatisfied citizens have challenged the contents and application of this particular regime of administrative guidance.

The Department's administration of the scheme was selected for study because of a range of attributes it possessed. First, the intrinsic importance of the scheme for many individuals, groups and institutions in society, including students (and their parents) who received a total of £63 million in allownaces during 1981-2, and institutions of higher education which were paid £52 millions in fees during the same year under the ambit of the Scheme.[2] Secondly, as the Scheme involved direct administration by the Department it offered the possibility of examining the roles of administrative guidance regarding both policy formulation and the subsequent implementation of those policies by the same government department. Thirdly, the fact that the Scheme was administered by one organisation housed in a single building (the Awards Branch of the Scottish Education Department) reduced the problems associated with ensuring that the officials interviewed and observed were representative of all those engaged in the relevant activities. Fourthly, whilst no previous academic research had been carried out into the operations of the Branch there were indications from other sources (namely reported investigations by the P.C.A. and the Branch's annual guide to the Scheme) that administrative

guidance appeared to be a significant factor in the processes of Branch decision-making. Finally, despite Professor K.C. Davis' assertion of the ease with which research into British central departments might be undertaken -

> "I could go to a building, look at the directory in the entrance hall, select an administrator, go to his office, introduce myself, explain that I had questions to ask, get him interested in the questions, be given information on almost any subject not properly considered confidential, develop some interplay of minds, and even be invited back for further sessions"[3] -

our civil service is not noted for its openness,[4] and therefore the practical possibility of being able to undertake research within the Branch encouraged the selection of this programme for investigation.

(1) Background to the Administration of the Scheme by the Awards Branch

Prior to analysing the current administration of the Scheme by the Branch, it is desirable to consider briefly the previous Scottish system of public grants for full time degree level students, as the implementation of that programme had a profound effect on the contemporary situation. During the post-war period grants to students attending institutions of higher education were payable at the discretion of local education authorities. Under section 43 of the Education (Scotland) Act 1946, Scottish education authorities were empowered to pay allowances to persons over school age and resident in their areas so that they might, " ... take advantage, without financial hardship to themselves or their parents, of any

educational facilities available to them ... "[5] This power was subject to annual regulations promulgated by the Secretary of State under the above statute.[6] However, these regulations did not affect the substantive discretion of the education authority; they merely set out what types of payments should be made (e.g. matriculation and class fees), together with those which could be made (e.g. food allowances) if the authority decided to award a grant under section 43 of the 1946 Act.

By the late Nineteen Fifties, university numbers in Britain had doubled to around 100,000 students and this increase coupled with developing concerns over discrepancies between education authorities' award practices encouraged the Secretary of State for Education (with responsibility for England and Wales) and the Secretary of State for Scotland to establish a joint committee to review the systems of student grants. The Anderson Report[7] was published in 1960 and reflected an optimistic and expansionist attitude towards the financing of higher educational study. It recommended that one coherent national policy govern all applications for degree level grants and that such a policy should include the following principles: similar treatment for males and females, freedom for the applicant to choose between home or away study, and the absence of discrimination between courses. Regarding the administration of student grants the Committee stressed the requirement of "equivalent treatment" of applicants because,

> " ... uniformity alone cannot secure fair treatment for all. As we have already shown, we consider a flexibility of approach essential so that the special factors which affect many students can be taken into account. We think this can be achieved only if discretion is given to the award-making bodies on several important matters; and yet we know that,

> if things are left as they are, with a large number of award-making bodies, different decisions would inevitably be taken on precisely similar cases by different bodies."[8]

Therefore they recommended two broad models of administration each of which had advantages and disadvantages. First there was the option of continued administration by local authorities, subject to a regime of detailed rules enshrined in delegated legislation which limited their discretions and imposed duties upon them. Such a system would have the advantages of utilizing the established experience of local authority officers in dealing with student grants, whilst maintaining close geographical contact with the applicants. However, the Committee felt that this method still raised problems in the securing of equivalent treatment for applicants. Consequently they considered that it must be accompanied by an appeals structure allowing the relevant Secretary of State to determine appeals against the exercise of all discretions left with the local authorities. Alternatively, grants might be administered by central government departments with an obvious reduction in the number of district decision-making bodies, thereby reducing the opportunities for divergencies in the treatment of similar applications (though, as we shall discover later, this argument did not take into account the difficulties of ensuring consistent decision-making within one large bureaucratic organisation). Additionally the Committee believed that central government administration offered the possibilities of "streamlining and mechanisation". But weighing against those advantages was the objection that handling grants

at a national level," ... would involve an unwelcome amount of bureaucratic remote control ...".[9] Consequently, after outlining the evenly balanced options, the Committee left the final selection to the politicians because,"there are many practical considerations affecting the choice between these possible courses, some of these concern a much wider range of government policy than we can be expected to pronounce upon".[10]

It appears that in Scotland the decision to opt for central government administration of student grants following the publication of the Anderson Report was motivated by general cross-party criticism of the existing education authorities' performance of the task. This unanimity is succinctly summarised in an exchange during 1961 within the Scottish Grand Committee between the Conservative MP Mr Ian MacArthur and the then Labour MP Dr J. Dickson Mabon. The former stated his concern that Scottish students were receiving smaller grants than their English counterparts and continued, "that whether the County Councils are controlled by the Tories, by Labour or by anybody else, thirty five different scales of grant are now being awarded in Scotland and this must be a bad thing". To which Dr Mabon replied, "I accept that".[11]

The statutory foundation of the Allowances Scheme administered by the Awards Branch is located within sections 73 and 74 of the Education (Scotland) Act 1980, which re-enacts similar provisions dating back to 1962. Section 73 provides that the Secretary of State may in accordance with regulations made by himself pay allowances, "to or in respect of persons

attending courses of education", whilst section 74 allows him to attach conditions to the payment of allowances which the student must observe. Under the above statutory authority the Secretary of State has promulgated The Students' Allowances (Scotland) Regulations 1971.[12] These provide inter alia that he may pay an amount in respect of travel expenses, maintenance and other expenses incurred in taking advantage of available educational facilities; that a student's allowance shall be subject to a parental contribution; that overpayments must be repaid; and that recipients of allowances must satisfy the Secretary as to their conduct and progress. Also regulations issued in 1974[13] add that the Secretary may take a spouse's income into account when assessing an applicant's allowance.

From the above description it should be clear that statutory provisions only provide a rudimentary framework for the operation of the Scheme and contain few substantive details.[13*] Within the borders delimited by the Act and its associated Regulations the detailed topography of the Scheme is to be found inside intra-Branch administrative guidance. This guidance (whose precise extent and forms will be examined later in this chapter) defines the specific contours of the Scheme by elaborating those principles recommended by the Anderson Report which subsequent governments have endorsed (e.g. the freedom of students to choose between studying at local or away institutions), plus the policy objectives of the incumbent Executive (e.g. only to allow grants for repeat years where the student has medical or

compassionate grounds for his/her failure). As we shall discover when we analyse casework decision-making in the Branch, the officers base the overwhelming majority of their individual determinations regarding applicants' eligibility and financial entitlement on the contents of this administrative guidance. Consequently in administrative terms the Scheme is composed of the totality of this guidance (cf. our elaboration of the common features of administrative guidance in Chapter One where it was noted that frequently guidance represents the official basis of civil service decision-making, and demonstrates generality of coverage).

To enable interested citizens to perceive the basic shape of the Scheme as it alters over time the Scottish Education Department pubishes an annual "Guide to Students' Allowances"[14] This begins with the somewhat cryptic declaration that, "this booklet is intended as a general guide to the Students' Allowances Scheme and it should not be regarded as a statement of the statutory position".[15] Presumably what that caveat seeks to do is to inform the legally aware reader of the wide statutory discretion possessed by the Secretary of State and hence warn that ultimately it is up to him to decide whether he will award an allowance in any particular instance or not (as we shall learn later judicial review has offered little constraint upon this power). However, as far as this research was able to elicit it is only when an MP refers a constituent's case to the Secretary of State or the Minister of State with responsibility for education that an application may receive ministerial

consideration and even then the ministers are advised by the Branch on the basis of their administrative guidance. Therefore it is normally this regime of administrative guidance which forms the practical basis of both ministerial and officals' decision-making regarding applications for grants under the Scheme. Consequently the Guide goes on to summarise the major features of the intra-Branch guidance on questions such as eligibility criteria (e.g. residence, course of study and previous study by the applicant), how to apply for an allowance, and the factors taken into account in calculating the amount of an allowance, in over approximately twenty five pages of print. The extent to which the Guide condenses Branch guidance is indicated by the fact that junior officials within the Branch receive manuals and general instructions totalling several hundred pages of text. Nevertheless the officer responsible for producing the Guide considered that it provided a satisfactory balance between comprehensiveness and intelligible brevity; to achieve that equilibrium he kept a record of all protests received by the Branch concerning the Guide and these were considered when the next edition was written. Yet the Guide can still fail to convey the essence of the Branch's administrative guidance to affected citizens as our subsequent discussion of the P.C.A.'s investigations into the Branch's operations will show.

Although the Secretary of State for Education decided that England and Wales should have their student grants programme administered by local education authorities implementing mandatory rules enshrined in delegated legislation[16] which

could be enforced through judicial review by aggrieved applicants,[17] there are board similarities between the substantive contents of the two programmes, allied with close links connecting the Department of Education and Science and the Scottish Education Department. Following the Anderson Report's recommendation of national principles to govern student grants the D.E.S. and S.E.D. have generally[18] observed similar principles (e.g. on allowing students to choose between studying at local or away institutions) in the evolution of their respective schemes. No doubt this harmony has been encouraged by a standing joint working party which reviews proposed policy changes in the two schemes. This research was unable to determine the balance of power on that committee, but a senior officer in the Branch commented that the inequality in size and resources between the D.E.S. and the S.E.D. meant that, "we are always running on the D.E.S.'s coat-tails". It may be observed that even under the English/Welsh system of administering student grants administrative guidance exists in the form of a forty-page set of "Notes for Guidance" issued by the D.E.S. to all the L.E.A.s. According to the former,

> "In these Notes the Department offers advice on what appears to constitute a reasonable interpretation and method of application of the Regulations. Authorities may find it helpful in the interests of consistency to adopt this advice. Responsibility for decisions in respect of awards matters rests with the L.E.A. concerned and these Notes should not be treated as if they were authoritative; only the courts can provide an authoritative interpretation of the Act and Regulations."

Hence interpretative guidance may explain statutory rules while the Branch's guidance elaborates the policies governing the Secretary of State's statutory discretion.

(2) The Annual Cycle of Tasks Performed by the Branch

Now that we have considered the statutory and administrative history of the Scheme it is possible to detail the range of functions performed by the Branch in administering student grants in Scotland. As to the basic salient facts of the Branch, it was established in 1961 in the S.E.D.'s Division dealing with higher and further educational matters. By the middle of the Nineteen Seventies the Branch had become physically unified in one building and almost simultaneously a large portion of its operations were computerised. At the time of this fieldwork (early 1983) it consisted of approximately one hundred and thirty officers[19] who were handling about 61,000 applications for grants per year, with over £123 millions being disbursed in fees and allowances.[20]

From April of each year onwards the Branch begins to receive applications for allowances covering the next academic year, and these are initially dealt with by the Registry Section who check to ensure that all relevant documents have been included (e.g. acceptance letters from educational institutions) and that the application form itself has been completed (incomplete applications are returned for completion by the applicant). After this filtering, Registry establish a computer record for new applicants by filling out a card for the Scottish Office

Computer Service (S.O.C.S.) with basic details from the application form (e.g. applicant's name and address), whilst continuing applications have these details checked and where necessary amended. Then the forms are sent to the relevant Territorial Section for processing.

The Territorial Sections are the prime loci of routine casework decision-making within the Branch and usually consist of two Clerical Officers (C.O.) supervised by one Executive Officer (E.O.). Each C.O. handles about seven hundred applications per year. Applications are distributed between Territorial Sections by allocating responsibility for different institutions and courses covered by the scheme to particular sections, consequently one C.O. might be dealing with all the applications relating to a number of small colleges or a proportion of those applicants attending a large University. Once the application forms reach the appropriate section the E.O. will divert new ones to himself (N.B. the male form will be used throughout for ease of reading, but it should be borne in mind in the interests of accuracy that whilst a majority of E.O.s and senior officers are male a majority of C.O.s are female) so that he can ascertain their eligibility under the Scheme on a number of fundamental criteria (such as residence of the applicant within the U.K. and Scotland, and the nature of the course). If he has doubts about their acceptability he is required to pass them up to his Higher Executive Officer (H.E.O.) who may in turn pass them to his Senior Executive Officer (S.E.O.). When the E.O. approves the application on the preceding grounds it goes to his relevant C.O. for "coding",

this means processing the information contained on the application form so that the computer can calculate the amount of allowance to be paid to the applicant. Coding involves the C.O. in transferring the application form information (e.g. on term-time residence) into a code number provided by the Branch Box Code Manual. For example the Manual may provide that applicants living in Halls of Residence are entitled to the higher "elsewhere" rate of maintenance allowanceand this will be designated by a certain code number which should be placed in the appropriate code box on the application form by the C.O. if the applicant has signified that he is going to be living in such accommodation. Hence the C.O. is not merely transferring the applicant's disclosure into information intelligible to the computer, but is making decisions as to the amount of the applicant's award in accordance with the rules and categories contained in the Manual. When the C.O. has finished coding the application it must be passed back to the E.O. who will check the C.O.'s processing and if the former officer is satisfied with the decisions reached the completed form will be returned to the Registry section.

With the aid of a number of temporary summer staff Registry transfer the digital information contained in the application forms code boxes onto other forms which go to the S.O.C.S. for entry onto the computer and calculation of the amount of the applicant's award. The S.O.C.S. then send out letters of award to the applicants and their parents, with payable orders being dispatched to the appropriate educational institutions for distribution to the applicants at the beginning of each term.

During November and December the Territorial staff have to begin obtaining final information from the parents of applicants who have only been able to disclose estimates of their income for the former financial year, and any corresponding adjustments to the award calculations must be made and notified to the S.O.C.S. Then throughout January and February the officers are responsible for paying the applicants' approved fees to their educational institutions; together with checking if any applicants have given up their courses and where necessary determining what overpayments must be recouped. Finally, to round off the Branch's year the Territorial officers have the task of scrutinising their applicants' claims for travel allowances and authorising their payment, in accordance with Branch General Instructions, by the S.O.C.S.

These then are the distinct administrative tasks undertaken by the Branch together with a brief description of its general internal organisational structure. In the next section we shall deepen our analysis regarding the determination of individual grant applications, by examining the types of decisions which are made at the different levels within the Branch and the influence of administrative guidance upon them.

(3) Casework Decision-Making Within the Branch

One significant feature of the Branch's administrative process in transforming the Secretary of State's wide statutory discretion into thousands of individual decisions concerning students' applications, which sought to be consistent and fair

to each particular applicant, involved the distribution of a series of casework discretions across the hierarchy of grades in the organisation. In this context discretion is given Jowell's meaning of, " ... the room for decisional manoeuvre possessed by a decision-maker,"[21] with the qualification that these discretions detected in the Branch were either granted by the internal administrative guidance or by unwritten practices to which the senior officers gave their official approval. Consequently this notion of discretion differs from K.C. Davis' concept which he defines as occurring where, " ... the effective limits on (a public officer's) power leave him free to make a choice among possible courses of action or inaction".[22] Thus our modified version of Jowell's definition distinguishes between decisional freedoms which are legitimate according to the distribution of formal authority within the organisation and those which are illegitimate, whereas Davis' definition does not allow for such distinctions. Hence from this perspective we can understand why Reiss criticises the breadth of Davis' usage, noting, "I am inclined to conclude that Professor Davis means discretion occurs wherever a public official makes a decision, and I assume that by a decision he means that a choice is made among alternatives".[23] However, our idea of discretion is compatible with Dworkin's observations that,

> "The concept of discretion is at home in only one sort of context; when someone is in general charged with making decisions subject to standards set by a particular authority ... Discretion, like the hole in the doughnut, does not exist except as an area left open by a surrounding belt of restriction. It is therefore a relative concept. It always makes sense to ask, 'Discretion under which standards?' or 'Discretion as to which authority?'"[24]

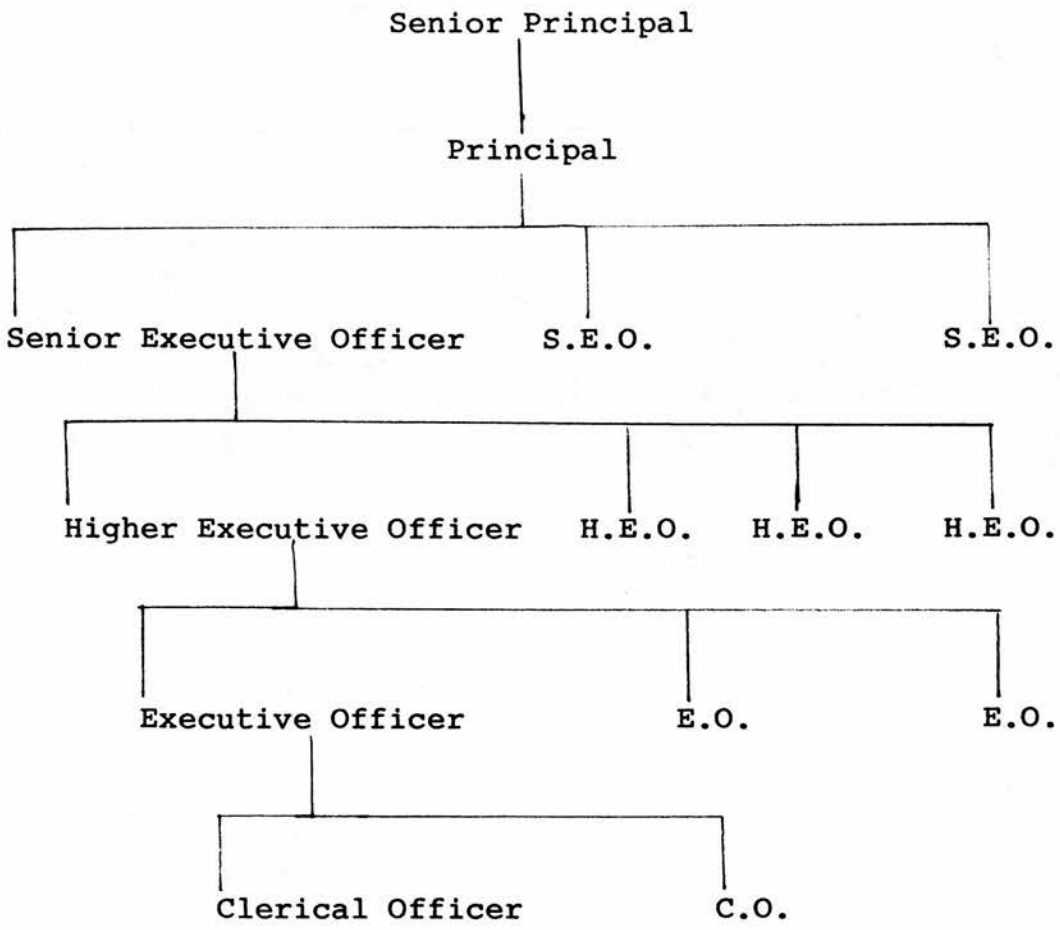
because the principles of the scheme enshrined in the Branch's administrative guidance provide the main ingredients for these varied doughnuts. But the features of Branch discretions do not fully accord with Bull's comment on Dworkin's discussion of discretion,

> "I am concerned that the term 'discretion' tends to be used in respect of at least three activities in which officers engage: interpreting rigid rules; taking decisions in areas where it is decreed inappropriate to have such rules; and using their freedom to depart, in exceptional circumstances, from these rules. I prefer to reserve the term 'discretion' for the last of these three freedoms and to call the first two 'judgement'."[25]

For the reason that this dissertation has consistently argued that administrative guidance is not solely composed of specific rules (and this case-study will shortly re-iterate that point), therefore, the boundary between situations where rules govern officers' decision-making and where rules do not exist is not always a clear one; instead various forms of non-mandatory guidance (e.g. composed of hypothetical questions) may aid officers' decision-taking. Now that we have ascribed the meaning to be given to the term discretion in this context it is possible to elaborate upon the range of official discretions existing in the Branch.

At the level of Clerical Officers the major discretion which was noted concerned their decisional freedom to demand verification of the financial declarations submitted by applicants and their parents. For example the C.O. training programme notes provided the following advice, "use your common sense to determine if claimed mortgage interest relief seems

The Formal Hierarchical Structure of the Branch



reasonable in relation to total income declared, if it looks high demand verification from the Inland Revenue." However the C.O.s were bound by the documentary evidence originating from professionals such as accountants or other government departments supplied by applicants. Consequently this discretion only allowed C.O.s to affect the amount of allowance paid to a particular applicant where he could not support his statements with appropriate documentation.

Executive Officers, on the other hand, were given a number of discretions which empowered them to directly determine the size of applicants' allowances. One of these governed the authorisation of travel grants, as Branch General Instruction Number Seven provided that E.O.s were responsible for approving travel claims up to the value of £500. This Instruction told E.O.s that they should try and familiarise themselves with the geographical areas around the educational institutions covered by their section (e.g. through studying maps and public transport fare lists) so that, "if this is done and if common sense is used staff should become experienced in spotting questionable claims". This guidance was supplemented with the basic provision that only claims equal to the cheapest form of public transportation should be allowed. Yet the Instruction did not leave E.O.s with a mere yes or no freedom when faced with actual claims, instead they could either accept the application or substitute their own calculation of what they consider would have been the cheapest form of transportation - and that is by no means a simple mechanical selection when the myriad of types of fares and transportation are taken into account.

It was possible to establish a rough perimeter around the areas of E.O. discretion by outlining those types of cases which were normally dealt with at more senior levels. These fell into two broad categories, of which the first was the smallest and easiest to define as it consisted of those classes of cases which under Branch guidance had to be passed up to S.E.O. level and encompassed inter alia, suspected fraud and requests for repeat years on compassionate grounds. The second category was more nebulous and included those cases which individual H.E.O.s expected their E.O.s to pass on to them. In practice this category was not rigid and depended upon the relationship between the particular E.O. and H.E.O. under consideration. This can be illustrated by reference to one H.E.O. who had promulgated a list of twenty one classes of cases entitled "Cases to be referred to H.E.O." and which under head twenty included, "in general, appeals against earlier decisions, difficult cases and cases of interest for information". Permeating the compiling of this list was the application of hindsight regarding those types of cases which had led to complaints and appeals by applicants in the past. Nevertheless despite its potential ambit the H.E.O. did not actually expect every case coming within the list to be referred up, only "the difficult ones". But as one of his E.O.s explained, the definition of a difficult case alters and becomes less expansive as the E.O. increases in experience and competence. Therefore, it was very problematic to list the cases coming within this second category in abstract terms as they could only be detailed for a particular E.O.-H.E.O. relationship at one point in time.

We can conclude that all E.O.s had some similar discretions in relation to processing specific aspects of students' applications (e.g. in approving travel claims) but this common core was added to, and also delimited by, the individual nature of their relationship with their H.E.O. and his requirements on passing up cases.

Turning now to the H.E.O. grade, this represented a watershed within the formal organisation of the Branch as it was the highest level concerned mainly with territorial casework. In the words of the official job description, a H.E.O. was responsible for the "supervision and management of a section comprising Executive Officers, Clerical Officers and Clerical Assistants dealing with the assessment and payment of student grants under the computer system. Guiding junior staff on points of difficulty arising in the eligibility of applicants, in the assesment of student grants ... ". Therefore H.E.O.s played an important role in linking the casework officers (or interestingly "the troops" as the senior officers informally designated them - a choice of terminology which would have suited Weber's ideal-type bureaucrats and have conformed with the images of the Scientific School) together with their viewpoints and problems, with those of the Senior Branch staff. This position thereby enhanced the significance of the H.E.O.'s general discretion covering the volume and types of cases they decided to refer up to their S.E.O.s and those which they retained for personal determination. This discretion was broadly similar to that possessed by the E.O.s except that none of the three S.E.O.s had produced any lists of classes of cases

that must be referred up. Additionally the S.E.O.s appeared to leave the onus of forwarding cases upon the H.E.O.s more than the latter did to their E.O.s. Generally the H.E.O.s tended to pass cases upwards where they considered that their proposed decisions might produce future repercussions such as complaints to Members of Parliament or where they beleived the particular case raised issues of importance for the Scheme as a whole.

Apart from the above discretion common to all H.E.O.s individual officers had further discretions conferred by specific responsibilities. For example one H.E.O. was in charge of the Overpayments section which had the task of obtaining cash repayments from former students who had been overpaid by the Branch (e.g. because they withdrew from their courses before the end of term). Under Branch Policy Minute Number One this officer had a discretion to write off overpayments between £20 and £200 in value after he had written two official letters requesting repayment without obtaining satisfaction. He was left free to decide when or whether he would invoke his authority, though for amounts over £200 Treasury approval for writing off was required.

The next tier of authority within the Branch was that of the three Senior Executive Officers. Each of these officers was responsible for approximately one third of the total number of Territorial Sections plus a particular functional responsibility from the aggregate of internal administrative guidance revision, computer services and the Education Authorities Bursary Scheme. Therefore, it was possible to broadly divide S.E.O.s' tasks into

two categories; firstly there was the personnel aspect which essentially concerned itself with deploying officers in their Territorial jurisdictions to the greatest effect, together with conducting the important annual reporting exercise (S.E.O.s are countersigning officers for reports on E.O.s and reporting officers on H.E.O.s). Whilst S.E.O.s' discretions within that area of responsibility probably had an influence upon the casework operations of the Branch it was too extraneous to be pursued in the fieldwork. However, the second category of S.E.O. duties - casework supervision - was of central concern to our research. The volume of that work could be gauged from one S.E.O.'s statement that he expected to receive about six or seven live cases from his H.E.O. during an average week. But in practice the significance of those determinations was much greater than their mere numbers, because as observation revealed they normally involved wide-ranging issues which went beyond the facts of the particular case in point. Hence they tended to be treated by the S.E.O.s as establishing precedents for the Scheme.

From a scrutiny of cases determined by S.E.O.s it appeared that they exercised two major discretions regarding grant applications. First there was the question of deciding the exact scope of the Scheme in relation to the courses covered by the programme. In one case the Branch had granted an allowance to an applicant for three years so that he could complete a Bachelors degree in Architecture at an English university; then he re-applied for an additional allowance to enable him to gain his R.I.B.A. part two qualification from one of a number of English

institutions. The S.E.O. reacted to this application by consulting Department of Education and Science administrative guidance to elucidate how they would recommend Local Education Authorities in England and Wales to treat such an application, and concluded in accordance with the guidance that a further allowance should be given provided the course did not involve higher degree work. Another case involved a Psychology graduate who was undertaking a two year post-graduate course in Educational Psychology which included both a teacher training and an M.Sc. element. She subsequently applied for a further allowance in respect of the teacher training portion of the course claiming that it came within the ambit of the Scheme. But the S.E.O. refused the contention on the grounds that the whole qualification was subject to the Scottish Post-Graduate Quota Scheme and as the applicant had been unsuccessful under that programme she should not obtain a grant via the 'backdoor'.

Secondly, the S.E.O.s appeared to possess the discretion to dispense with the detailed rules enshrined in the intra-Branch administrative guidance where the particular circumstances of the case were deemed to demand such treatment in the light of the underlying principles and policy goals of the Scheme. This demonstrates the existence of a discretionary power which was motivated by a concern to provide individualised justice within the parameters of a programme essentially based upon formal justice. An example of that discretion in operation involved the case of a student who had been given a one year suspension of his allowance during his last term at university because of intense personal problems. The Branch determined that he had been

overpaid but notified him that they would not demand a cash repayment, instead they would deduct it from his final term's grant in one year's time. His university then refunded one third of his last year's fees to the Branch. After the lapse of his suspension the student returned to university and completed his degree, but without bothering to re-apply for an allowance (presumably because he knew it would be subject to a large deduction in respect of his repayment). When his university sought the payment of his final term's fees from the Branch the latter organisation informed them that they could not pay the fees as the Scheme only covered the fees of students who applied for allowances. Nevertheless the university continued to press for payment of the fees over a two year period and eventually they were paid. The S.E.O. responsible noted that there were no similar cases recorded in the Branch's Policy Files and that it would be unfair to punish the university financially for the student's technical omission in not applying for an allowance to cover his final term. So here it was an educational institution and not a student which gained from the exercise of that discretion! A further example, where it was a student who sought the benefit of the discretion, revolved around the closing date for applications under the Scheme. According to the annual application form, continuing students should return their completed applications by the 15th May preceding the relevant academic year; however, the Branch would in fact accept applications up to the 31st December but this latter date was strictly observed. In this case the applicant had applied for, and been granted, a minimum award for the previous academic year. She then telephoned the Branch in early December claiming

that her father had not completed or forwarded her application form for that year as he wanted her to join him in business. The Branch responded by sending her a new form but this was not returned until the 7th January when the applicant brought it in personally claiming that her father had again refused to return the completed form to the Branch and that she had been forced to steal it from him. In considering whether to accept the application after their final closing date the S.E.O. telephoned the applicant's university who stated that she had not contacted anyone there for help. After taking into account that the applicant's sister had applied for, and been given, a minimum award for the last three years the officer concluded that the applicant had a large degree of responsibility for ensuring that her application was completed and returned by her father and that she should have brought the matter to the Branch's attention earlier; therefore, he would not waive the final closing date in that case.

From the above cases we can note that the S.E.O.s exercised their discretions on the basis of an evaluation of the attributes demonstrated by the applicant's case assessed against the fundamental features of the Scheme (e.g. not to finance higher degree research - to pay the fees of eligible applicants - not to unnecessarily interfere in applicants' domestic circumstances). As these decisions were extremely difficult to make, there was a general practice that all three S.E.O.s should unanimously agree with the decision reached in order to reduce the chance of arbitrary determinations occurring. For certain types of cases the officers formally sat in committee (e.g.

applications for repeat years on compassionate grounds), but normally consultation was achieved informally by personal discussion (the officers all had adjoining offices) or written memos. In those rare situations where unanimity could not be achieved the case was referred for determination to the Principal or Senior Principal, who had final responsibility for deciding all exceptional cases within the Branch.

Paralleling the above hierarchy of official discretions it was possible to differentiate the forms of internal Branch administrative guidance governing those powers together with the other decision-making responsibilities of the officers. C.O.s had their decision-making regulated by numerous rules contained within various forms of administrative guidance whose disparate origins appeared to owe more to historical events than administrative logic. First there was the Box Manual, which has already been mentioned; it was composed of about one hundred loose-leaf pages and solely guided C.O.'s coding of the annual application forms. To that end the Manual sought to provide answers to difficulties and problems the C.O.s might encounter in processing the bulk of those applications by providing detailed administrative rules which implemented the general policies of the Scheme. For example it set out a specific definition of what amounted to a reasonable daily travelling distance for applicants, lists of situations where the "elsewhere" rate of grant was paid and the types of income to be disregarded when Dependents' Allowances were calculated. Complementing the Box Manual were the Branch General Instructions which were contained in one file almost as weighty

as the Manual. The General Instructions established how the C.O.s should perform their tasks beyond coding the annual application forms. They differed slightly from the Manual in that they had both a procedural and policy element. In regard to the former aspect the Instructions provided for the allocation of functions between the various parts of the Branch (e.g. the Registry, Territorial and Overpayments Sections); while their policy content specified rules governing inter alia the approval of travel claims, the granting of special equipment allowances and provisions for study abroad. Finally the C.O.s had copies of all four Branch Policy Minutes which elaborated upon topics dealt with in both the Box Manual and General Instructions, however, their training only covered two of them.

The first of those dealt with circumstances involving a student's withdrawal from his place of study and the calculation of any possible overpayment made to him which must be recouped. That Minute offered an outstanding example of the extent to which a general Ministerial statutory power (that covering the authority to require overpayments to students to be repaid[26]) may be subject to extensive administrative development, which in that case went so far as to cover the type of letter to be written by an officer to the executor of a student who had died owing money to the Branch! The second Minute covered the provision for repeat years and changes of course by students.

From the preceding exposition we can conclude that C.O.s were subjected to an extensive amalgam of precise administrative rules when exercising their powers. Irrespective of the

nomenclature assigned to the form of the administrative guidance (i.e. whether it was derived from the Box Manual or the Branch Policy Minutes) it demonstrated the same common characteristics of specific binding requirements. Therefore, it was not surprising to discover that one train of thought amongst some senior officers favoured the ultimate incorporation of all the above provisions within one comprehensive manual. However, their more immediate concern was to try and achieve the annual revision of all the forms of guidance used in the Branch to take account of recent alterations in a rapidly changing Scheme. Such a goal had not been achieved for several years with the consequence that individual officers were responsible for amending their own copies of the relevant Manuals, Instructions and Minutes; thereby increasing the possibility of different officers making different decisions on the basis of conflicting guidance as some failed to keep up with the changing rules.

Executive Officers also had their discretions regulated by the above forms of administrative guidance. But they received additional training in the use of the two Branch Policy Minutes excluded from the C.O.s' ambit. Those Minutes differed from the other two by reason of the generalised nature of their contents. For example the Minute dealing with residence eligibility of applicants stated that they must have been "ordinarily resident" in the U.K. for at least three years prior to their application; however, it continued by observing that such a condition was "extremely difficult to define" and suggested that officers broadly equate the phrase with a person's "home" which might be ascertained by asking questions such as where did the applicant's

parents live? or where did he go during his school/college vacations? Similarly the Minute covering post-graduate courses which were within the scope of the Scheme formerly relied upon the somewhat nebulous notion of qualifications for a "first and basic career". Hence the majority of decisions reached by E.O.s were governed by specific rules, but unlike the C.O.'s situation some of the administrative guidance applying to the former grade was not composed of rules but instead consisted of recommended tests and illustrative guides to decision-making.

Higher Executive Officers had access to policy papers on specific topics (e.g. residence requirements) that were not available to their subordinates. Futhermore a major source of guidance to H.E.O.s was the Branch Policy Files. Although these files were nominally open to officers of all grades it was generally accepted that H.E.O.s were the lowest grade in the Branch whose decision-making responsibilities warranted regular recourse to them. The Files differed from the forms of administrative guidance already examined in that they were not duplicated statements of Branch policy and procedure; instead they were composed of papers covering inter alia, casework decisions made by the Senior Principal or Principal, discussions with Ministers, intra civil service deliberations, consultations with outside bodies (e.g. universities or professional associations) and any related newspaper cuttings. Each file dealt with a major issue or problem encountered by the Branch in administering the Scheme (e.g. the introduction of a post-graduate quota scheme), and their objective was to provide any officer reading a file with sufficient information to

understand the basis and evolution of the policy underlying a particular facet of the Scheme. So the files provided guidelines for H.E.O.s, but their format required different, and greater, skills in extracting the appropriate policy factors and applying them to the individual cases under determination compared with the rule-governed decision-making of the lower Territorial staff.

The Senior Executive Officers also relied upon the Policy Files, together with their own previous casework decisions. One S.E.O. had chosen to keep a personal index of all the cases he had been involved in determining and that was used by the other two officers to aid them in tracing helpful previous cases and thier explanatory minutes. However their previous decisions were not automatically binding upon the S.E.O.s, and one officer explained that their usefulness was diminished by a rapidly changing Scheme (e.g. fundamental recent changes have encompassed residence qualifications, postgraduate study and repeat years) and differences in the material circumstances of individual cases which reduced the opportunities for deciding by analogy. It appeared that at that level in the Branch, rule based administrative guidance in the form of the Box Code Manual etc. played a minor role in decision-making. Indeed one S.E.O. proclaimed that because of time pressures she had never been able to read through the Box Manual and General Instructions properly!

Ultimately at the Principal Officer grade the criteria governing casework decision-making reached their most abstract

and generalised form. One officer admitted that when the arguments in favour of a decision were evenly balanced he fell back on the dictates of "commonsense and fairness within the parameters of a scheme funded by public money", which might be termed his subjective morality.

The process of casework decision-making was notable for the increasing breadth of the "room for decisional manoeuvre" provided by the hierarchy of official discretions the further upwards in the levels of decision-making one travelled. As we have seen the discretion of C.O.s was essentially limited to deciding whether they would require applicants to provide documentary evidence in support of their financial claims. By contrast in a tiny minority of cases S.E.O.s exercised their discretion to reach determinations which were in accordance with the philosophy of the Scheme but nevertheless technically in breach of the rule-based internal Branch administrative guidance (e.g. to pay the formerly suspended student's final terms fees). Almost symbiotically co-existing with that decision-making structure was the regime of administrative guidance which became progressively less rigid and specific as one moved away from routine Territorial section casework. Hence at the Principal/ S.E.O. grades the primary emphasis was upon promoting the objectives of the Scheme, whilst at the C.O. strata it was to ensure a correct application of the Box Manual and General Instructions to the individual applications. However, these different emphases were not incompatible as they had as their common objective the satisfaction of the Anderson Report's major administrative recommendation regarding the "equivalent

treatment" of all applications for grants. Indeed it was by a combination of rule based decision-making for the overwhelming majority of applications combined with provision for exceptional cases to be passed upwards for individualised consideration according to their merits in the light of the policy goals of the Scheme that the Branch sought to comply with Anderson's recommendation. But the facility for those exceptional cases needed to be triggered by an E.O. referring the particular case upwards and that mechanism suffered from the possible weakness that the officer was under little external pressure to do so, as affected applicants neither knew of the provision for such cases nor of the appeals procedure (to be discussed later) which had the effect of bringing the case to the relevant H.E.O.'s attention.

From a broader organisational perspective the system of administrative guidance operating in the Branch suggests that while the content of guidance may remain consistent throughout the office its forms and nature may differ. Therefore, it would be inaccurate to state that the Branch's guidance consisted merely of the generally distributed Box Manual or Policy Minutes without also having regard to the Policy Files of the Branch. Additionally we must be aware that particular pieces of administrative guidance may possess varied significance for the decision-making of distinct grades within the same organisation. Hence all the officials within a single bureaucracy are not equally rule bound!

(4) Situations Where Officals Acted in a Manner Contrary to the Requirements of the Branch's Administrative Guidance

In the foregoing analysis of the influence of administrative guidance upon casework decision-making, no reference was made to situations in which the officials disregarded the applicable guidance. In this section we shall examine some of the instances where that occurred, the possible motives encouraging such behaviour and the action taken in the Branch to prevent the detrimental effects of similar behaviour recurring. Presumably officials could have disobeyed the relevant guidance by taking decisions which were assigned to other officials (e.g. an E.O. rather than an S.E.O. deciding to allow an applicant a repeat year on compassionate grounds) but such a flagrant disregard was not observed during the fieldwork. Instead the examples discovered involved an official making authorised decisions without paying heed to the formally correct requirements of the appropriate administrative guidance. As that behaviour occurred in a variety of decision-making contexts and appeared to be influenced by heterogeneous motives, for clarity the subsequent examination will locate individual instances along a spectrum ranging from situations of intentional flouting of the guidance at one extreme to unintentional flouting at the opposite end.

At the intentional flouting pole one example centred upon the payment of placement travel expenses incurred by special groups of students (e.g. those studying social work) over and above their ordinary daily travelling costs. According to the Branch's administrative guidance at that time placement travel

claims should be paid in full, but ordinary travelling expenses should have had the nominal travel element in the maintenance allowance deducted from the claimed total. Under those provisions the majority of affected Territorial Officers paid placement travel claims in full irrespective of whether the students claimed ordinary travel expenses or not. But the effect of that approach meant that some placement students were obtaining their full placement travel costs even where their combined placement travel and ordinary daily travel expenses fell below the nominal maintenance allowance travel element. Consequently a minority of officers had been deliberately ignoring the requirements of their administrative guidance by deducting the nominal travel element from placement claims and then paying any subsequent daily travelling claim in full. At a meeting of Territorial staff the minority's practice was discovered and later the Branch's guidance was amended to incorporate their approach. Although the minority's practice was clearly contrary to the requirements of the relevant guidance it was presumably motivated by their desire to ensure the more effective attainment of the Branch's policy (i.e. to pay placement students the total amount by which their placement and daily travelling expenses exceeded the travel element in their maintenance allowances) and therefore provided an exemplary demonstration of Blau's process of "adaptation" at work.[26*] However, the practice undermined the Anderson Report's principle of "equivalent treatment" of all applications so far as placement students were concerned, because these travel claims being processed by the majority of Territorial officers were being paid in full while the calculations made by the minority of officers

deducted the travel element.

Another example of a situation where an officer stated that he had deliberately reached a decision contrary to the precise demands of Branch guidance involved the granting of exemptions from a parental contribution to mature students. Under the applicable administrative guidance the student must satisfy the officer that he has supported himself financially for three years, nevertheless the officer said that he had been willing to allow such exemptions where the student had failed to meet the three year period by a "couple of months". Again the official considered that he was positively promoting the policy objectives of the Scheme by having regard to the spirit rather than the letter of the guidance.

Not all examples of officials intentionally disregarding administrative guidance can be justified in terms of the officers' wishes to secure the achievement of the Branch's policy goals. For example several Territorial officers claimed that sometimes they did not utilize the Box Manual of General Instructions to guide their decision-making through simple laziness. The existence of such a tendency was independently confirmed by one H.E.O. when he described the syndrome of "old hands" who, once they had mastered the administrative guidance produced by the Branch during one period of time, demonstrated great reluctance to observe or implement changes in that regime because of the effort required from them to keep up to date with the alterations.

Moving towards the middle of the spectrum of situations where officers flouted the requirements of Branch guidance as formally understood by the senior staff, we encounter the development of idiosyncratic interpretations of those provisions by individual Territorial sections. Whilst reflecting neither a wholly intentional nor unintentional rejection of the officially correct interpretation, that occurrence was said by one E.O. to be the product of the unique combinations of personalities involved. The officer then characterised that trend as one of "evolution" whereby over a period of time a particular interpretation would grow within the section only to be challenged if a new incoming E.O. disagreed with it or senior staff became aware of its existence. Obviously these developments undermined the uniformity of decision-making across the Territorial sections and the senior officials were accordingly anxious to minimize their occurrence and detrimental effects, as we shall discover when we examine their strategies to combat the practice later in this section.

Finally, at the unintentional disregarding end of the spectrum, some officers reached decisions on the basis of a complete misunderstanding of the relevant administrative guidance. Therefore, those officers presumably thought that they were observing the guidance, but in fact judged from the standpoint of their fellow officers they were ignoring the correct meaning which had received the approval of senior officers. An example of such behaviour manifested itself in the administrative repercussions following the protests of George Cunningham M.P. to the Department of Education and Science about

the treatment accorded to life insurance premiums in the calculation of parental contributions.[27] Subsequently the Branch decided to review their decisions given during the preceding academic year in a category of similar cases. A number of C.O.s were selected to conduct the review and according to one H.E.O. they were given "idiot-proof" instructions as to how the re-assessment was to be implemented. Yet at the end of the exercise it was discovered that two of the officers had so mis-applied the administrative guidance that their cases had to be reconsidered again.

Irrespective of the forms or motivations of Territorial officers' disregard for the generally observed and formally correct requirements of the Branch's administrative guidance, such behaviour undermined the consistency of overall casework decision-making. Therefore, senior management had progressively introduced various mechanisms to reduce the incidence of that behaviour and to try and limit its detrimental effects upon individual cases. Those will now be examined beginning with the system of intra Branch checking.

In a forceful advocacy of the virtues associated with internally reviewing administrative decisions Davis observed,

> "what may be called the 'principle of check' means simply that one officer should check another, as a protection against arbitrariness. The most usual checking authority is a superior of the officer who acts initially, who in turn may be checked by his superior in a hierarchial organisation ... Paradoxically, the principle of check is often at its best when it is limited to correction of arbitrariness or illegality, and it may be relatively ineffective when it includes de novo review. This is because of the important

> fact, sometimes overlooked, that a de novo determination may itself introduce arbitrariness or illegality for the first time and not be checked, whereas a check may be limited to the one objective of eliminating arbitrariness or illegality, so that almost all final action is subject to a check for arbitrariness or illegality."[28]

In many ways the system of intra-Branch checking accorded with Davis' analysis, however it possessed two distinct origins. First these were those checks which were explicitly provided for by the procedural element of the Branch's administrative guidance. General instruction number six required E.O.s to check all the annual application forms coded by their C.O.s although in practice because of the time constraints suffered by E.O.s they tended to ignore those parts of the coding which had only a general statistical value as opposed to a substantive financial implication for the applicant. Moreover, H.E.O.s were obliged to check a random selection of one hundred applications coded by their section before the end of June and another one hundred before the end of October. The second category of checks were those arising out of the particular processes of the Branch. For example, where urgent payments had to be made to students the authorisation for those "manual payments" must have been given by a S.E.O., and one officer of that grade had developed the technique of using such cases as a mechanism for scrutinising the operation of her subordinate staff via a detailed inspection of the case notes accompanying the request for payment authorisation. That method neatly solved some of the problems of supervising a number of staff

engaged in administrative, as opposed to physically productive, tasks without the need for a constant personal presence. Additionally modern technology appeared to be increasing the opportunities for senior staff to check their subordinates' decision-making by remote means. The Branch received weekly feedbacks from the Scottish Office Computer Service which inter alia, revealed how each officer who had used the on-line computer facilities had inter-acted with the machine (i.e. listing how many false or cancelled actions they had made), and provided undisclosed checks on any possible staff fraud.

It can be concluded that the Branch had developed an extensive system of checking which sought to ensure that much casework decision-making was subjected to regular review by E.O.s, supplemented by random examination by H.E.O.s. Furthermore some of the Branch's processes enabled even more senior officers to monitor the decision-making being made by their Territorial sections without the need for a potentially negative physical presence within the offices occupied by those officials. Computerisation takes that practice one stage further by increasing the opportunities for unknown and yet factually objective checking of subordinates' determinations and will presumably grow in significance as a method of achieving the demands of the principle of checking.

Secondly, in a move to promote consistency of decision-making across the Territorial sections the Branch during the late 1970s introduced a common training programme for C.O.s and E.O.s Prior to that reform new recruits were merely presented with the aggregate total of operative administrative guidance to be read through before they began work in the

Territorial sections. Apparently many newcomers were reaching such vastly differing interpretations of those extensive provisions, coupled with a greater susceptibility to the idiosyncracies of their first Territorial section, that it was decided to strengthen and standardise the initial training given. In the words of one S.E.O. the contemporary training was designed to prevent the development of "quirks" in the decision-making habits of new officers. Essentially the programme consisted of two weeks training on a one to one basis by designated experienced training officers, generally with a C.O. training a C.O. and mutatis mutandis for E.O.s. A notable feature of the course was the formal verbatim dictation of training notes given on difficult rules, definitions or calculations, with the objective of providing a uniform guide that the new recruits could turn to first when faced with problems in their territorial work. Hence the Branch gave guidance on its own internal administrative guidance. The initial course was supplemented by a further period of training after the new entrant had experienced case-work for a few months so that any problems encountered could be dealt with.

Thirdly, adjustments in the structure of decision-making within the Branch had been introduced in order to encourage uniformity in the application of internal administrative guidance. Examples included the allocation of all the complex parent-child assessment cases to one long-serving officer, and the distribution of territorial supervisory jurisdiction between the S.E.O.s so that all the courses of a particular specialist type (e.g. theological training) fell within the responsibility of one S.E.O., thereby encouraging comparability in interpretation and subsequent casework determination.

To conclude this section we should note that the examples of officials disregarding the appropriate administrative guidance examined above were merely isolated illustrations of the informal processes of the Branch as foreshadowed by the analyses of the Post-Weberian theorists. As we discovered in Chapter Two those informal processes could either aid the rational achievement of the organisation's goals (e.g. the minority of oficers' treatment of placement travel claims) or undermine them (e.g. the deliberate disregarding of new administrative guidance by some of the so-called "old hands"). Furthermore these examples re-iterated the variety of motives underlying such behaviour including self-interest (e.g. the avoidance of the effort of keeping up to date with a constantly changing scheme), the desire to provide subjective/individualised justice to applicants (e.g. the officer's treatment of mature students), and the wish to see the Branch achieve the fundamental objectives of the scheme (e.g.- placement travel claims). In the light of Blau's articulation of the continually dynamic relationship between formal and informal processes within a complex organisation[28*] it would appear that senior staff in the Branch will never be able to eradicate completely those unplanned reactions of their subordinate staff to the internal administrative guidance. At best they can hope to minimise their occurrence - (e.g. through a standardised training programme coupled with a comprehensive checking system designed to reveal the detrimental consequences of the various informal processes. The diversity and adaptability of those processes means that responsibility for detecting their existence and effects must be placed

mainly upon the senior staff of the Branch because only they have sufficient proximity to the daily evolution of decision-making within the organisation. External grievance handling agencies may have a subordinate role in bringing the individual effects of such processes to the attention of senior officials, as will be examined below, but ultimate responsibility must remain with the latter group; in Mashaw's words,

> "the quality of justice provided in such a system depends primarily on how good the management system is at dealing with the set of conflicting demands that define rational, fair and efficient adjudication."[29]

On a more general level the experiences of the Branch regarding its officers' reactions towards administrative guidance suggest that the framers and promulgators of similar provisions must strive for a fine balance between comprehensiveness and intelligibility. Failure to achieve such an equilibrium may undermine consistent and equivalent decision-making, either by omitting to clarify important areas of policy (e.g. did the notion of "illness" in the rule allowing repeat years necessitated because of illness encompass a student suffering from regular menstrual problems?) or by creating such a "dismal swamp" of extensive guidance that officers are unable to find the shortest and safest passage through it (one Branch C.O. expressed the view that "we have exceptions for every rule here.") Furthermore the history of the Branch indicates that where administrative guidance is used to govern sophisticated decision-making by large numbers of officers it needs to be combined with institutional mechanisms to monitor and adjust

those officials' responses to the guidance if the official goals of the organisation are to be efficiently achieved. Davis recognised that officials' discretionary decision-making could not be "confined" or "structured" simply by the use of administrative rules but also required "checking". Branch practice confirms that thesis whilst demonstrating that the institutional measures may have to be more elaborate by incorporating inter alia rigorous and repeated training courses together with re-arrangements in decision-making processes.[30]

(5) Remedies Available to and Pursued by Aggrieved Applicants

Taking account of the informal processes of the Branch and the inevitable occurrence of simple human mistakes in casework decision-making the question arises of what forms of remedies were available to dissatisfied or disappointed applicants? In the ensuing section we shall examine these remedies utilized by such applicants whilst seeking to discover the frequency of resort to the various types, their respective strengths and weaknesses from the applicant's and Branch's points of view, and the nature of the feedback they may provide to senior staff concerning routine decision-making by the Territorial officers.

According to a very senior officer of the Branch, the most frequently exercised remedy was that of a direct complaint or appeal to the Branch regarding a specific grant determination. He believed that the nature of the Scheme, involving relatively large amounts of money at least from the perspective of most

applicants allied with a fairly articulate clientele, meant that the Branch was definitely at "the interface of public accountability". Thus where applicants become displeased with a decision or calculation made by Territorial officers, they were "immediately on to the Branch." However, such an assessment must be counterbalanced by the observation that applicants might not know about the relevant policies or guidance of the Branch (the possibility of differences existing between the published Annual Guide's summaries and the internal guidance of the Branch will be examined below in the analysis of the P.C.A.'s investigations into the administration of the Scheme), nor of their undisclosed "right" to have their case reconsidered by a higher level officer within the Branch. Although the Branch did not operate a formal appeals system, there was a general practice that objections to particular decisions should be reviewed at one grade above the original decision-maker. Hence in the light of these procedural weaknesses we can understand why Oda has termed the filing of a complaint against an administrative agency as "the most primitive form of administrative remedy."[31]

The volume of objections handled by that method could be roughly gauged by one E.O.'s estimation that he received about twenty to thirty appeals against his determinations during an average year. As most of the appeals related to the assessment of the maintenance allowance for which E.O.s were responsible, the H.E.O.s bore the burden of deciding the majority of appeals. Normally the appropriate E.O. would write a minute in reply to the dissatisfied applicant's contentions and upon these conflicting written views the H.E.O. would reach his decision.

Occasionally appeals would be passed up to the S.E.O. level, where the H.E.O. concluded that the deciding officer had made a major mistake or where the appeal raised wider issues. One S.E.O. stated that a dominant factor in the referral of appeals to him was the possibility of external repercussions about the case (e.g. complaints to M.P.s by aggrieved applicants). Therefore, the S.E.O.s were motivated by a desire to reach decisions which could, if necessary, be "justified" to strategic outsiders. Those comments were interesting in linking internal appellate processes with external accountability.

The primary external agency involved in the securing of redress of aggrieved applicants mentioned by Branch officers was that of Members of Parliament. Where M.P.s decided to pursue a constituent's grievance against the Branch, by parliamentary convention they referred the matter to the Secretary of State for Scotland or the Minister of State in the Scottish Office with responsibility for education. The case was then dispatched to the Branch for reply within a ten day period. Compared with direct appeals to the Branch, M.P.s cases followed an inverse path because when they reached the Branch they were normally sent down to the relevant Territorial H.E.O. who was required to "marshall the facts and quiz the E.O.", according to one officer of that grade, whereupon the response to the M.P.'s letter then proceeded back through the hierarchy of the Branch and on to the Minister's private office. Officers within the Branch claimed that irrespective of the route followed by the complaint/appeal the same reply should be given, but whether that happened in practice could not be ascertained by our fieldwork. However, one fundamental division noted in the responses to applicants'

objections (whether made directly or via an M.P.) was that between cases alleging administrative mistakes (e.g. Territorial officers reaching faulty financial calculations) and those challenging particular policies and rules of the Scheme. In the former category the reviewing officer would be more likely to agree with the applicant's contentions than in the latter category, where the relevant provisions would have been formulated at a much higher (possibly Ministerial) level of authority. That distinction between challenges to administrative action and the merits of specific policies could also be found permeating the decisions of the P.C.A., who is the next external agency to be considered.

The fact that students' allowances are administered by a central government department in Scotland has uniquely brought them within the jurisdiction of the P.C.A. compared with the situation pertaining to English and Welsh students. By June 1984 seven reports of investigations by the P.C.A. into the implementation of the Scheme by the Branch had been published. In five reports the P.C.A. found no incidents of maladministration[32], and in another he discovered that the Branch had erroneously paid an allowance to a student who was already receiving an RAF scholarship but that the student had not suffered any injustice as a consequence of the mistake.[33] However, in his most recent investigation he encountered an applicant suffering injustice through the Branch failing inter alia to follow its own administrative guidance.[34]

From the earliest Branch case onwards the P.C.A. has rigorously observed his Sachsenhausen doctrine (the details of

which will be examined in Chapter Five) in refusing to question the merits of the policies contained within the organisation's administrative guidance. For example, in one case[35] the father of a student complained that the Branch required him to disclose his earnings generated in Ethiopia for the purpose of determining the size of his assumed parental contribution. After noting the nature of the statutory foundations of the Scheme the P.C.A observed that,

> "the Department have adopted guidelines (which have, in themselves, no statutory force) to ensure that this discretion is exercised fairly between applicants and these are published annually in a booklet ..."[36]

Those provisions contained a requirement that parents disclose all their sources of income, consequently the P.C.A. concluded,

> "I do not question government policy regarding the parental contribution on the gross income of parents, wherever it is earned. I therefore do not uphold the complaint as presented to me."[37]

Even where he found that the correct application of the Branch's administrative guidance caused financial hardship to a mature student, the P.C.A. had to express his inability to criticise the policy content of the relevant rules.[38]

In a more recent case the P.C.A. has accepted the legitimacy of the Branch altering its interpretation of its own guidance.[39] As we saw earlier the scheme used to allow applicants to obtain allowances for postgraduate courses of study where they were necessary in order for the student to be qualified for a "first and basic career". During an investigation into the refusal of an allowance for one

applicant's postgraduate study the P.C.A. found that in 1980 the Minister of State in the Scottish Office "... had decided that the Department had previously been erring on the generous side in making awards to students who he considered were already qualified for a first career."[40] Subsequently the P.C.A. discovered, "it was decided to adhere more strictly to the principle set out in paragraph five of the Department's booklet 'Guide to Student's Allowances' that awards should be made only where both the first degree course and the postgraduate course are the normal requirement for admission to a first and basic career...."[41] Therefore as the complainant's application had been properly assessed under the new approach the P.C.A. concluded that no maladministration had occurred and that

> "in times of financial restraint Departments have to consider what savings can be made in areas where they have discretion. In the case of the S.E.D. this has included postgraduate allowances. The inevitable outcome has been disappointment for some students who on the basis of precedent, had expected to receive one."[42]

Presumably the statutory restrictions upon the P.C.A.'s ability to review policy decisions coupled with the ministerial origins of the demand for a changed interpretation underlaid the Commissioner's response in that case.

In his latest report the P.C.A. openly criticises the Branch on several grounds. The case[43] concerned a student who had withdrawn from courses of study twice during the nineteen seventies. In 1980 she was given a grant for a two year diploma course and in 1981 she repeated the first year, but because of

an error on the part of Branch staff they continued her grant under the impression that she was completing her final year of study. Then in 1982 when she applied for a grant to pursue her second year the Branch refused on the basis that the rules of the scheme only allowed an applicant to claim an allowance for the minimum period necessary to complete a second course where she had previously been funded for part of another course. Eventually the student complained to the P.C.A. about the Branch's alleged sudden decision not to fund her final year of study. After investigating the Branch's refusal he reported that the relevant Territorial officer should have written to the student in 1980, when her allowance was awarded, informing of the applicable rule of the Scheme. In the P.C.A.'s words,

> "I have seen the relevant departmental instructions which clearly state that such a warning letter must be sent ... I must criticise the Department for their failure to follow their own instructions..."[44]

Nevertheless the S.E.D. argued that the student had been given a sufficient warning of the rule by paragraph fourteen of the 1982/2 Guide which stated "where a student is permitted by the academic authorities to transfer to another course before the start of the second year of a course for which a Student's Allowance has been granted, the award will be continued for the minimum period required to complete the new course but the student will not be assisted to repeat any year of the new course." But the complainant claimed that she had read paragraph fourteen as applying only to second courses taken up immediately after withdrawal from a first course. The P.C.A. decided that

"I can see some justification for the complainant reaching the conclusion which she did. Indeed I think it is unfortunate that the guide is less definitive on the matter than the Department's internal instructions are. These say quite unequivocally that a student is regarded as changing course if, for any reason, he or she withdraws prematurely from a course and immediately or subsequently applies for a grant in respect of another course. If advice on these lines had appeared in the guide, it would, I think, have been clear to the complainant that a period of employment between courses did not alter the principle that grants were to be refused for repeat years of study for the new course. As it was, the guide left some room for misunderstanding."[45]

Consequently, in the light of the several errors made by the Branch, the P.C.A. found that the complainant had suffered injustice as a result of maladministration by officers within the organisation and recommended that the S.E.D. pay the complainant's fees and allowance for her second year, and should reconsider the phrasing of paragraph fourteen. The Prinipal Officer of the Department agreed to abide by those recommendations.

The above case is significant not merely because it involved the first finding of injustice caused by maladministration of the scheme by the Branch, but also because of the P.C.A.'s critique of the Annual Guide's comprehensiveness. Undoubtedly departments administering a major governmental programme on the basis of a wide statutory discretion is the agency's monopoly of

one of the inherent weaknesses from the citizen's perspective of

control over the dissemination of information regarding the policies and detailed administrative guidance governing te exercise of the discretion in individual cases. The citizen cannot have recourse to statutes or delegated legislation for an authoritative statement of the basic premises of the programme but must rely solely upon the department's release of what it considers to be sufficient information. Whilst the Branch's Annual Guide contains many of the fundamental principles of the Scheme, the inevitable disparity in size of such a booklet compared with the totality of the internal administrative guidance we have encountered suggests that a difficult compromise must be reached over the contents of the Guide. Despite the confidence of the Branch concerning their achievement of that delicate equilibrium this case demonstrated that it had not been attained.

From the standpoint of officers within the Branch they sought to place the reports of investigations by the P.C.A. in the context of over 600,000 applications for allowances processed in ten years. But despite the remote statistical chance that any one determination by a particular officer might be followed up by an investigation, senior officers were highly sensitive to the P.C.A.'s existence; one officer semi-seriously touched his desk top and said (accurately at that time), "touch wood he has not found against us yet." However, below the grade of H.E.O. the possibility of censure by the P.C.A. did not appear to be a very significant factor in influencing Territorial officers' case work decision-making, a finding which accords with Gregory and Hutcheson's similar conclusion.[46]

The final, and least used external agents to whom dissatisfied applicants resorted when faced with what they considered to be objectionable Branch decisions were the professions of law and accountancy. According to several Territorial officers those representatives were employed by applicants to deal with technical matters such as accountants' queries over the calculations of parental contributions, or solicitors' documentation concerning questions of custody and divorce. The specialists did not often appear to be involved in the formulation or presentation of disappointed applicants' challenges towards the merits of Branch guidance, but whether that result was the product of the applicants' own abilities or their belief in the inappropriate nature of the two professions' distinct skills could not be ascertained by our fieldwork. The reasons why lawyers did not advise their clients to seek a judicial remedy will be examined a little later.

To summarise, direct appeals/complaints to the Branch by dissatisfied applicants had the advantages for them of cheapness and speed. Nevertheless the legitimacy of the procedure by which those representations were evaluated may be undermined from the viewpoint of citizens affected by Branch decision-making because of the absence of publicity surrounding its existence or requirements. Furthermore the fact that applicants who do make representations to the Branch are unlikely to be aware of the formal structure of decision-making within the organisation may mean that they experience less than optimum respect and satisfaction with the official response because they do not appreciate the significance of a decision made by an H.E.O. as opposed to one reached by an E.O. These

propositions suggest that it may be important to strive for the openness of procedural guidance, as well as that of policy guidance, if public understanding and acceptance of significant administrative decision-making is to be promoted.

Secondly, despite the fact that the limited resources of the P.C.A. mean that he can only conduct a very few investigations into complaints against the handling of the Scheme by the Branch, his existence provides some benefits for both dissatisfied applicants and senior officers within the Branch. For those members of the former group whose cases he pursues his reports may help to assure them that they were treated fairly within the provisions of the Scheme by explaining how and why an adverse decision was reached on their application (e.g. the mature student's case), or by securing redress for them when he finds that they suffered injustice as a consequence of maladministration (e.g. the repeat year student). Senior staff may for their part gain the advantage of having an experienced external specialist review aspects of the administrative process operating in the Branch. Although they can be proud that in the overwhelming majority of instances the P.C.A. dismissed the complaints against their organisation's determinations, the continual possibility of further investigations may prevent any complacency in their monitoring of Territorial casework developing.

Finally, the research indicated a likely connection between the legal nature of the regime of rules regulating a governmental programme and the range of remedies available to aggrieved citizens. That was a factor which the Anderson Committee did not include in their assessment of the various systems of

student grant administration, despite its importance for individuals. However, under the Scottish Scheme the combination of a programme where many of the basic principles (as well as their detailed elaboration) were to be found in administrative guidance, allied with the judiciary's historically underdeveloped responses to the doctrinal questions raised by those types of provisions (see Chapter Six for details) presumably explained why no legal actions had ever been raised against the casework decisions of the Branch. If it had not been so difficult to formulate a successful legal claim on the basis of administrative guidance we might have expected some of the disappointed applicants to have sought a judicial remedy, particularly in the context of a large scale programme which has been experiencing major changes in the last few years with the likely consequential increase in aggrieved applicants (e.g. postgraduate and repeat year students). Nevertheless those applicants were effectively denied a judicial evaluation of their entitlements and instead had to seek other forms of redress (e.g. through their M.P.s) Therefore, the fact that a programme is based upon administrative guidance may severely curtail the possibility of judicial review of individual determinations, which is a consequence that ought to be openly considered when the legal and administrative nature of such a scheme is being decided upon. Whether the absence of judicial review is considered to be advantageous or detrimental can ultimately only be determined according to the multiplicity of relevant criteria governing the format of the specific programme but they should always include an examination of the forms of remedies available to disappointed and dissatisfied citizens.

Conclusion

While the specific features of the Branch's operations detailed in this chapter may not be replicated elsewhere across the range of central government activities, many of the insights that we have gained regarding the forms and uses of administrative guidance are likely to have much wider applicability. One reason for that universality can be found in the nature of contemporary central government administration. Where large numbers of civil servants are engaged upon implementing numerous complex programmes (e.g. immigration control, taxation and environmental planning) the writings of the Organisation Theorists and this case study indicate that the general organisational requirements for the regulation and co-ordination of such large-scale and sophisticated decision-making necessitate the use of administrative guidance to inter alia allocate decision-making powers within the various organisations, establish the criteria governing the decisions distributed between the distinct grades of officers, and to explain the procedures by which those powers are to be exercised. Furthermore, where Parliament merely delegates to a Minister (i.e. to the department) the responsibility for a particular task (e.g. paying student grants) without elaborating the principles upon which the power is to be used, administrative guidance will be frequently utilized to fill in the policy foundations. Therefore, these features of the modern administrative process in Britain should warn us that administrative guidance is an inevitable element of contemporary

government. Consequently we must not view the "L code" regulating legal aid officers[47], or the "S Code" governing supplementary benefit officers[48], or the "Circular Instructions" detailing censorship rules for prison governors[49], as isolated and idiosyncratic devices for conducting specific departmental business, but instead must seek to comprehend them as component parts of the largely unexamined and unpublished phenomenon of administrative guidance.

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CHAPTER FOUR

Administrative Rule-Making Under the United States' Federal Administrative Procedure Act

Introduction

In this chapter we shall preface our consideration of the domestic legal responses to administrative guidance with an element of comparative study. The benefits flowing from examining how the heritage of a foreign legal system has responded to these provisions, which we have termed adminstrative guidance, include the prevention of intellectual parochialism and the potential infusion of insights derived from the experience of another legal system (e.g. regarding the classification of guidance) into our subsequent analysis.

Although it is vital to appreciate the differences between the legal and governmental systems of individual nations, lawyers in several distinct jurisdictions have written about provisions broadly similar to British administrative guidance. For example Jan H van Kreveld has published his doctoral dissertation on Dutch "policy rules" which he defines thus, "policy rules are general rules which are adapted and followed by an administrative authority in the exercise of its discretionary powers".[1] Later he elaborates upon their essential components which are, "(1) it is a general rule, (2) which concerns the exercise of a discretionary power of an

administrative authority towards the citizen, (3) of which the legal base is not to be found in the relevant statute but implicitly in the administrative power ...".[2] Despite the fact that these rules are not imbued with specific statutory authority the author observes, "the duty to follow policy rules originates from the legal principles of proper administration: particularly from the principle of equal treatment, the consistency principle and the principle of legal security."[3] From a Japanese perspective Hiroshi Shiono details the existence of "regulatory", "reconciliatory", and "promotional", "administrative guidance", which he describes collectively as, "administrative actions taken by administrative organs, although without legal binding force, that are intended to influence specific actions of other parties (feasance or nonfeasance) in order to realize an administrative aim."[4] He continues to explain graphically how the unique cultural context of governmental activity in Japan encourages the use of "administrative guidance"; "to have administrative organs formally and strictly exercise regulatory powers basically is not preferred in our country ... the approach preferred in Japan is to create a situation that is acceptable to both the administrative organs and the other parties through informal negotiation."[5] Hence we learn that the detailed characters of these provisions are naturally shaped by particular national forces. However, the fact that roughly analogous provisions exist in several administrative systems suggests that they may have common origins in the tasks being undertaken by contemporary welfare/interventionist states through bureaucratic administrative organisations, which are then faced with the

universal problems of applying complex governmental programmes to large numbers of individual citizens. If that is so then the virtues of comparative study may be even greater because other legal systems will probably have had to contemplate identical questions to those facing British law (e.g. how can these provisions be classified?; should they be subject to judicial enforcement?; what degree of public participation in their formation should be required?; and should the public have access to their contents? etc.).

We shall concentrate upon the U.S. Federal experience of administrative rule-making for two reasons. First because of the importance assigned to that practice by significant participants in the U.S. legal system, and secondly due to the fact that it is within the parameters of U.S. law that Professor K.C. Davis has vociferously advocated the merits (for both America and other countries) of administrative rule-making to control the exercise of discretionary governmental powers and thereby promote the provision of justice to individual citizens. Consequently by seeking to discover in greater detail the actual legal response to such rule-making we will be in a better position to comprehend Davis' arguments and to assess their applicability to British administrative guidance.

The Ideas of K.C. Davis Regarding Administrative Rule-making.

Davis begins with the question, "in our entire legal and governmental system, how can we improve the quality of justice for individual parties: how can we reduce injustice?"[6] His short answer is that it requires us, " ... to open our eyes to the reality that justice to individual parties is administered more outside courts than in them, and we have to penetrate the unpleasant areas of discretionary determinations by police and prosecutors and other administrators, where huge concentrations of injustice invite drastic reforms."[7] In a subsequent publication he explains why he wants to concentrate upon that facet of administrative activity,

> "The reason I am searching for ways to eliminate unnecessary discretion and to control necessary discretion is not that human beings cannot exercise unlimited and unguided discretion wisely, justly, and beneficiently. Many can. Many do. The reason is we do not know how to select the ones who can and do; most of our European and American and other administrators in fact exercise discretion wisely, justly, and beneficiently only a part of the time. Out of a thousand officers, no matter how well screened, a large portion may be expected to abuse their discretionary power to a considerable extent, and some - perhaps only a few - are likely to engage in occasional abuse of power that is quite serious."[8]

Against that backdrop of human failings Davis believes U.S. administrators have unnecessarily wide discretionary powers as Congress has been forced to delegate extensive decision-making authority to them because, "no matter how expert their helpers may be, legislators are less than omniscient and usually are wise, when they establish an agency, to attempt no more than to legislate broad frameworks for administrative policy-making."[9]

Additionally he considers that administrators frequently (sometimes unlawfully) extend the range of their particular discretions.[10] Therefore, whilst continually reminding us that a balance must be maintained between necessary and unnecessary discretion, "let us not oppose discretionary power commensurate with the tasks undertaken by government; let us oppose discretionary power that outruns those tasks."[11] As he acknowledges that, "discretion is a tool; indispensable for individualization of justice ... rules alone, untempered by discretion, cannot cope with the complexities of modern government and of modern justice. Discretion is our principal source of creativeness in government and in law."[12] He concludes that the existing equilibrium is too far towards the unnecessary discretion part of the scale as, "perhaps nine-tenths of unjustice in our legal system flows from discretion and perhaps only one-tenth from rules."[13] Consequently he recommends the "confining" of unnecessary discretionary powers. "By confining is meant fixing the boundaries and keeping discretion within them. The ideal, of course, is to put all necessary discretionary power within the boundaries, to put all unnecessary such power outside the boundaries, and to draw clean lines."[14] To establish these boundaries, " ... the chief hope for confining discretionary power does not lie in statutary enactments but in much more extensive administrative rule-making ..."[15] Davis continues,

> "The procedure of administrative rule-making is in my opinion one of the greatest inventions of modern government ... The usual procedure is that prescribed by the Administrative Procedure Act, the central feature of which is publishing proposed rules and inviting interested parties to make written comments ... The procedure is both fair and efficient. Much experience proves that it usually works beautifully."[16]

He then claims that administrators should utilize the above procedure to promulgate legislative administrative rules (see below for definition) in order to set limits around their necessary discretionary powers; furthermore, where the officials do not possess delegated legislative powers they should still use the rule-making procedure to create policy statements and interpretative rules. Once the boundaries of necessary discretion have been fixed the next task is to "structure" the exercise of the remaining discretionary power; that requires the administrators to, " ... regularize it, organize it, produce order in it, so that their decisions affecting individual parties will achieve a higher quality of justice."[17] According to Davis the foundation of structuring is openness because it

> " ... is the natural enemy of arbitrariness and a natural ally in the fight against injustice. We should enlist it much more than we do. When plans and policies and rules are kept secret, as through confidential instructions to staffs, private parties are prevented from checking arbitrary or unintended departures from them ... The goal should be to close the gap between what the agency and its staff know about the agency's law and policy and what an outsider can know. The gap can probably never be completely closed, but the effort should always continue."[18]

Again, administrative rule-making is recommended as a technique for the promulgation of policy statements and rules to structure official' discretions.[19] Finally, as we have already discussed in Chapter Three, Davis states that the remaining necessary discretions should be subject to a regime of internal and external "checking".

The preceding ideas appear to be based upon the premise that the exercise of discretionary governmental powers can be prevented from becoming arbitrary by being subjected to pre-existing administrative rules. Chapters Two and Three have indicated some of the difficulties in translating that objective into an organisational reality and in a similar vein Baldwin and Hawkins have voiced concern regarding Davis' understanding of the processes of administrative decision-making.[20] Yet Davis' commitment to democratic values does not allow him to accept all manner of administrative rules as suitable mechanisms for specifying the criteria that should govern the exercise of discretionary powers. To satisfy his demands the formulation of the rules must have involved public participation and their final content must be publicly available. Therefore, their procedural characteristics are beginning to resemble those of statutory provisions even if their substantive effects in law are dissimilar.

Apart from the "evangelical"[21] tone of Davis' writing, and his expansive definition of discretion (see Chapter Three), several areas of his analysis have been subjected to critical scrutiny. Amongst the foremost aspects of criticism attention has focused on Davis' failure to articulate fully the meaning he assigns to the concept of "justice to individual parties"[22]. Even after a close inspection of his work we are only able to discover odd glimpses of the content he gives to that notion. For example he seems to indicate that it covers "fairness" when he observes,

"Of course, even the agencies that are primarily regulatory are also concerned with problems of justice - and with mixtures and compounds that include problems of justice. In regulatory agencies, an ever present objective is to find the most satisfactory accommodation of the needs of effectiveness to the often conflicting needs of fairness, both substantive and procedural."[23] (emphasis mine)

Whilst subsequently he states, " ... equality is a major ingredient of justice ..."[24] Davis is even more blunt about the topic in his sequel publication, where he declares, "the inquiry is not into the question of what is injustice; instead we assume that each reader has his own conception of justice ..."[25] Although that may be a legitimate restriction in the scope of his investigation, it would have been helpful if Davis had at least explicitly stated whether he conceived the concept as spanning both substantive and procedural components (he implicitly appears to consider that it does as he gives the following examples of discretionary decisions affecting justice to individuals - the Social Security Administration's adjudication of claims for old age and survivors benefits[26] which emphasises procedural justice - and the decision of a policeman not to arrest a suspect when he was empowered to,[27] which is likely to be motivated more by considerations of substantive justice e.g. the suspect will be subject to greater punishment by his parents than by a juvenile court). Also it would have been interesting to know whether Davis accepts that the requirements of justice to individuals may vary between decision-making contexts (e.g. according to the implications of the decision for the individual citizen).

The circumstances surrounding the existence of a discretion are also central to the problem of determining if that power is excessively wide or in Davis' terminology "unnecessary", together with assessing when such a discretion has been sufficiently confined and structured. As he has given us little information regarding the content he assigns to the idea of "justice to individual parties" his analysis is unable to provide specific guides for the evaluation of actual discretionary powers. Instead we are offered generalisations, such as: "discretionary power can be either too broad or too narrow. When it is too broad, justice may suffer from arbitrariness in inequality. When it is too narrow, justice may suffer from insufficient individualizing."[28] Combined with personal conclusions,

> "my observation is that all levels of American government - federal, State, and local - are shot through with unnecessary discretionary power. Such power far exceeds what is necessary for an industrialized society ..."[29]

However, to discover the criteria that may contribute to the achievement of Davis' goals we must look elsewhere, as he acknowledged,

> " ... most of the thinking that has to be done to minimize injustice in the ways indicated is yet to be done."[30]

Jowell has added a significant contribution in this respect by outlining what he considers to be the strategic benefits and disadvantages of subjecting particular administrative discretions to control by rules ("legalisation")[31] The advantages include the promotion of certain interpretations of

the concept of the "rule of law", administrative integrity and an easier life for administrators, whilst the disadvantages contain the fears of legalism and rigidity. Nevertheless Jowell emphasises the importance of the empirical application of these factors because it is

> " ... clearly futile to propose or oppose legal control of administrative discretion in the abstract, for in the abstract the relative merits of devices of legal control may seem evenly balanced by their demerits. In assessing whether any given administrative task ought to be subjected to legal control, it is necessary first to recognise that costs and benefits exist, and then to weigh one against the other."[32]

In the light of the preceding chapters it can be argued that Davis has underplayed the significance of those organisational forces which encourage the creation of internal rules by bureaucracies. At one point he does admit that,

> " ... administrators in some circumstances have incentives to make rules which will confine their discretionary power, because regularization through rules can mean getting more accomplished with less effort; application of a rule may be easier than thinking out each individual problem."[33]

Yet he pays no attention to any of the literature on organisation theory despite its revelations about the interactions of administrators and rules in bureaucratic settings.

Davis' ideas have been praised on both sides of the Atlantic, with Professor Hepple commenting,

> " ... the themes which he emphasises will be central to the present discussion on the future of administrative law and of local government in this country."34

The reviewer was impressed with the technique of administrators confining and structuring their discretions via interpretative rules since these, " ... can be of considerable help to those who wish to advise members of the public what treatment may be expected."[35] Moreover, Judge Skelly Wright described Discretionary Justice as a "powerful manifesto" for renewing legal control over the U.S. Federal agencies. In his view the courts should take up Davis' call to seek to demand that the agencies regulate their discretionary powers by administrative rules; that being a perfectly constitutional strategy because, "administrative discretion was certainly created by law, and there is no inherent reason why the law should be unable to control it."[36]

Indeed, it is to the legal reactions towards administrative rule-making that we now turn in order that we may discover the nature and effects of the different types of rules mentioned by Davis, combined with an elucidation of the recent trends in Congressional and Judicial responses to the various categories of rules.

An Outline Account of the Development of Federal and Administrative Rule-making

The following history will concentrate upon the promulgation of "legislative rules" by Federal agencies as they represent the category of administrative rules which have attracted the greatest judicial, political and academic controversy. In

accordance with their designation rules coming within this class have the force of statute law and are the American equivalent of British delegated legislation. Just as in the U.K., Federal agencies must possess an express delegation of legislative power from the legislature (Congress in the latter's case) in order to be capable of making these rules. Schwartz states[37] that such a delegation ocurred during the First Congress over veterans' pensions, but it was not until the consolidation of a powerful Federal government began to occur after the Civil War that frequent delegations were granted. Then with the dawning of government regulation of business activities via the independent regulatory commissions, initiated by the Interstate Commerce Act 1887, a new era in administrative rule-making began. The justification of these innovative grants of legislative powers was that Congress could only establish the general principles of regulation and expert administrative agencies were needed to supply the detailed provisions. Nevertheless business did not meekly accept government regulation and up until 1915 continually challenged the various agencies' legislative rule-making together with their subsequent enforcement actions under the Fifth Amendment's "due process" doctrine with some success. Then in Bi Metallic Investment Co. v State of Board Equalization [38] the Supreme Court determined that "due process" obligations did not apply to legislative process, which Justice Holmes characterised as being concerned with matters of general application. Consequently, so long as legislative rules were directed at general issues, as opposed to specific individuals, they would not fall foul of due process procedural requirements.

The next phase in administrative rule-making occurred with the election of President Roosevelt and his "New Deal" interventionist programme in 1932. Soon the enactment of several statutes which delegated extremely wide legislative powers to administrative agencies was challenged before the courts on the grounds of violating the "non delegation doctrine" which required these delegations to be subject to effective limiting standards in the enabling statutes. In Schecter Poultry Corp v U.S. [39] this doctrine was invoked to declare unconstitutional the National Industrial Recovery Act's delegation of power to the President to issue codes of fair competition for industries. However, against the background of increasing economic decline, growing popular support for Roosevelt's ideas and eventually war, the Supreme Court relaxed the demands of this doctrine so that by 1943 it was virtually redundant as a restraint upon the delegation of legislative powers.[40] That outcome was explicitly demonstrated in the case of N.B.C. v U.S. [41] where the Communications Act 1934, which only required the Federal Communications Commission to inter alia act in the "public interest", was upheld.

Despite the above judicial successes of the New Dealers those persons, including particularly sections of the business community, who opposed the substance of Roosevelt's measures reacted by attempting to mobilise support against the procedures adopted by the new agencies. The fulcrum of this dissent was the American Bar Association which in 1934 created a special committee to review the practices of these agencies. It

initially proposed a new Federal Administrative Court but this was rejected by those practitioners who feared a consequent loss of employment. Then in 1939, under the chairmanship of Roscoe Pound, the committee issued a report[42] recommending inter alia that all the new agencies should be under a statutory duty to promulgate their legislative rules within one year of the enactment of the enabling statute. Furthermore any person "substantially interested in the effects of any administrative rule" would have locus standi to challenge the rule before the District of Columbia Court of Appeals. Although many criticisms were levelled against the report, including its attempt to impose uniform procedural obligations on all new Federal agencies, a Bill containing the report's recommendations was introduced into Congress. Verkuil commented that,

> "the forces in favor of the bill were undoubtedly led by those who were substantially opposed to (or tyrannised by) the New Deal programmes".[43]

Those interests were sufficiently successful in their lobbying that Congress passed the Bill and in order to prevent it becoming law the President had to exercise his veto over it.

In an attempt to defuse criticism of his action Roosevelt subsequently established his own committee to consider administrative procedures. Chaired by Dean Acheson it reported in 1941 under the title of the Attorney-General's Advisory Committee on Administrative Procedure.[44] On the basis of empirical research into the spectrum of Federal agencies the

committee split into a majority and a minority with the latter group recommending the creation of a Code of Fair Procedure to govern agency conduct. But by that time America was at war and attention had become deflected away from administrative procedure reform. During 1946 congressional interest again reverted to the administration and Representative Walter introduced a Bill based upon the 1941 minority recommendations. On that occasion his Bill did not discriminate against the new agencies as it applied equally to all Federal ones and allowed for some degree of individual agency adaptation by specifying only minimum procedural obligations. Consequently President Truman did not object to the Bill and it was enacted as the Administrative Procedure Act 1946 (hereafter for brevity referred to as the A.P.A.). Four years later the Supreme Court pointedly observed in Wang Yang Sung v McGrath,

> "The Act thus represents a long period of study and strife; it settles long and hard fought contentions, and enacts a formula upon which opposing social and political forces have come to rest."[45]

While the Act itself has remained unamended (apart from the grafting on of the Freedom of Information Act in 1966) the compromise upon which it was built has been virtually eroded, as will be seen below, in terms of specific statutory schemes and judicial reasoning.

As for the behaviour of the agencies, despite the legal support for rule-making in the forms of the N.B.C. decision and

the passage of the A.P.A. these organisations appeared very reluctant to engage in legislative rule-making. According to Shapiro that was because the agencies preferred to develop their policies via adjudication due to its supposed advantage of allowing retrospective action, easier departure from precedents and less severe judicial scrutiny.[46] Robinson has challenged each of those assumptions and concludes, "It seems more plausible that agency reluctance to use rule-making is due to simple reluctance to engage in broad planning efforts than to any perceived advantages in one form of procedure."[47] Whatever the explanation for the agencies' abstinence it is clear that during the early Nineteen Fifties only one agency regularly utilized legislative rule-making and that was the Federal Communications Commission. In the case of US. v Storer Broadcasting Co [48] the Supreme Court gave encouragement to the Commission's rule-making and thereby indicated the future directions of policy-making for many other agencies. The litigation concerned new legislative rules amending the number of radio and T.V. stations one person could operate. After giving notice of this proposed amendment in 1948 and after receiving comments from interested parties, including the respondent, the Commission promulgated the replacement rules in 1953. Storer then challenged the lawfulness of the rules claiming inter alia that they infringed an applicant's statutory right to a full evidentiary hearing before being denied a licence. Justice Reed for the majority began by stressing the judiciary's deference to agencies in the following terms,

> "The growing complexity of our economy induced the Congress to place regulation of businesslike communications in specialised agencies with broad powers. Courts are slow to interfere with their conclusions where reconcilable with statutory directions."[49]

Because of the width of the Commission's powers it was easy for the majority to determine that the challenged rules merely defined the public interest in protecting against overconcentration in the broadcasting industry. Consequently, as the Act provided that an applicant did not have a right to a prior hearing where his application was contrary to the public interest, Justice Reed was able to conclude that the Commission's rules did not violate an applicant's statutory rights and were therefore valid.

Gradually other established agencies began to appreciate the impact of the above judgment in terms both of judicial respect for agency rule-making, and its rejection of hearing rights objections with their "due process" overtones. So during the Nineteen Sixties many more agencies began to promulgate legislative rules via the informal procedure defined in section 553 of the A.P.A. (see below for elaboration). These changes in techniques for developing agency policies and requirements meant a departure from the traditional mechanisms of individual adjudications or formal rule-making involving evidentiary hearings and were often objected to by affected businesses. A spate of cases arose for the major regulatory agencies.[60] In

their determinations the courts upheld the agencies' use of section 553, but with tentative indications that the judiciary might demand more than the section's basic requirements. Later in the first half of the Seventies the courts were faced with a new phase of rule-making cases involving the modern agencies responsible for safety and environmental matters and again they allowed the rule-makers to use informal procedures. However, by that time the judges were developing their obiter dicta from the previous decade and common law additions were being fused onto the procedural requirements of section 553.

Paralleling those trends towards greater agency promulgation of legislative rules via section 553 procedures and judicial additions to their basic requirements, Hamilton has described how Congress has also been supplementing the procedural obligations of rule-making in specific statutes. While noting that "the procedural provisions of these statutes are almost unbelievably chaotic ...",[51] he detailed how they have necessitated inter alia agency consultations with advisory committees, review by Congress and oral hearings. Hamilton thought that the individual statutory expansions of section 553's demands had as their underlying premise the same one that motivates the judicial additions, namely a feeling that simple informal rule-making does not bring about sufficient public influence and participation in agency rule-making. Therefore, by the mid-Seventies the A.P.A. was in danger of losing its "procedural leadership" over rule-making, to borrow Verkuil's terminology, as both Congress and the courts altered its scope and redefined its requirements. Now we shall examine the details of the latter development.

The Administrative Procedure Act's Requirements for Rule-making: The Judicial Response

We must preface this section with an explanation of the major terms and concepts used by the A.P.A. as those establish the legal boundaries of administrative rule-making. By section 551 the word "agency" is defined as including "each authority of the Government of the United States" with the exceptions of inter alios Congress, the courts and various military bodies. Consequently the term includes virtually every organisation found within the Federal executive branch of government. Traditionally these have been divided into independent regulatory commissions which supervise, licence and rate-make for businesses coming within their jurisdictions; and government departments which have both "benefactory" and regulatory responsibilities. Though the President has less direct legal authority over the commissions, as the cases of Humphrey's Executive v U.S. [52] and Wiener v U.S. [53] demonstrate, for rule-making purposes the same principles apply.

The A.P.A.'s description of the notions of "rule-making" and a "rule" are just as wide as its definition of an agency. To understand the format of the statutory definitions it is vital to appreciate that, according to Schwartz, "the Federal A.P.A. is based upon the fundamental dichotomy between rule-making and adjudication."[54] Therefore section 551 begins by defining a rule in subsection (4) as, " ... the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law

or policy, or describing the organisation, procedure, or practice requirements of an agency ...", and by subsection (5), rule-making means an "agency process for formulating, amending, or repealing a rule". Subsection (6) defines an "order" as the "final disposition" of any matter other than rule-making, and by subsection (7) "adjudication" is the process leading to the creation of an order. The effect is that the statutory definition of a rule is the foundation upon which all the remaining definitions are based. It is an enormously expansive definition both in functional terms and in the inclusion of provisions which can possess either general or specific characteristics. This latter component is important because it reveals that the authors of the Act rejected the distinction between concern with general and individual matters as a test for distinguishing between legislative rule-making and adjudicating processes proposed by the Supreme Court in the Bi-Metallic case. Instead they adopted the test of "future effect" as the unique characteristic of rules. This raises the possibility that a court motivated by the general/particular aproach could conclude that a "rule" of a particular effect was in essence an individual order which demanded "due process" procedural protections for the affected citizen. Hence in 1972 the American Bar Association recommended that the A.P.A. definition of a rule be amended to delete the reference to particular effects.

In order to promote clarity in the following examination a functional classification of administrative rules which is implicit within the A.P.A. will be used to structure the

analysis of the judicial determinations.[55] The classification takes account of both legal and administrative attributes of such rules to distinguish between (1) those which establish statutory norms and have the force of law (legislative rules); (2) that group which contain agencies' interpretations of statutes and legislative rules (interpretative rules); and (3) rules which set out agencies' procedures (procedural rules).

(1) Legislative Rules

The A.P.A. establishes two models of rule-making for this class of rules: informal procedures (section 553) and formal procedures (sections 556-557). Legislative rules are now important in both a quantitative and qualitative sense. In respect of quantity by 1973 the Federal Register contained over 65,000 pages of legislative rules,[56] and with the modern legality of vague enabling statutes often basic principles are to be found within these rules thereby giving them qualitative stature too. This relatively recent occurrence of statutes delegating wide powers also has another effect upon legislative rules, namely that the legal requirement of substantive intra vires rule-making is much more easily satisfied nowadays. Moreover the traditional judicial demand that a legislative rule must be "reasonable", which goes back to a 1921 case concerning charges for customs officers' inspections on a bridge across Niagara Falls,[57] appears to be of little relevance today. Davis considers that that requirement is based upon the canon of statutory interpretation that Congress is presumed not to delegate the power to act unreasonably,[58] but whatever its

origins it does not provide an effective limitation upon rule-making; instead the courts concentrate upon the procedure of rule-making.

(a) Informal Rule-making - Section 553

This procedural format is the standard model for legislative rule-making and applies unless a specific enabling statute adds to section 553 or formal rule-making is invoked by the methods outlined later. Frequently this model is referred to by the colloquial expression of "notice and comment" which relates to its major procedural components. However, subsection 553(a) sets out a number of strategic exceptions covering certain subject areas where legislative rules do not have to comply with the section's requirements: these include military and foreign affairs, together with rules affecting "public property, loans, grants, benefits or contracts". Consequently many rules governing important aspects of what Reich has termed "government largess"[59] are not susceptible to the A.P.A.'s promulgation procedures. Also there is a general escape clause which allows agencies to circumvent section 553, irrespective of the subject matter of the legislative rule, where they certify that to observe its requirements would be "impracticable, unnecessary, or contrary to the public interest" (s. 553 (b)(3)(B)).

Where the section does apply it mandates the publication of notice of proposed rule-making in the Federal Register unless affected persons are served with actual notice (s. 553(b)). The notice must cover the time, place and nature of public

rule-making proceedings; a statement of the legal authority under which the rule is being issued; and finally either the terms or substance of the proposed rule, or a description of the subjects and issues involved. Then the agency must "give interested persons an opportunity to participate in the rule-making through submission of written data, views, or arguments with or without opportunity for oral presentation" (s. 553(c)). That is the crux of public participation in informal rule-making, consequently the agency is given a wide freedom by the statute to determine the ways in which "comment" will be allowed in any particular rule-making exercise. Then, after considering comments received, the agency must incorporate in the publication of the final rules "a concise general statement of their basis and purpose". Schwartz and Wade observe on the above procedure that,

> "these provisions were modelled upon those contained in the British Rules Publication Act 1893, and constitute a belated effort to obtain democratisation of the rule-making process without destroying its flexibility by imposing procedural requirements that are too onerous."[60]

Certainly in the formative years of modern rule-making the courts paid great deference to agency expertise and actions. For example in Pacific States Box Co. v White [61] the Supreme Court applied the principle that agencies engaged in informal rule-making did not have to prove the existence of the facts upon which they based their rule, as adjudicators had to do with regard to their determinations. And in Norwegian Nitrogen Co v U.S.[62] an agency was allowed to utilize its own knowledge when formulating rules via an informal procedure. Similarly in

Lansden v Hart[63] (which was one of the earliest cases decided under section 553) the court refused to criticise a rule-making procedure where the Secretary of the Interior, relying upon departmental advice, confirmed a wildlife order six days after notice had been given and five days before an oral hearing was to be held! But today such judicial restraint and procedural laxity is part of history as the ensuing cases graphically illustrate.

The notice requirement of section 553(b) came under judicial scrutiny in Wagner Electric Corp. v Volpe,[64] where the Administrator of the National Highway Safety Administration had promulgated a new vehicle safety standard governing indicator lights and hazard flashers. He had first given notice of a proposal to change their performance criterion and the appellant manufacturers had made written comments. When he published the final rules they altered both performance and testing criteria, so the appellants complained that notice had not been given of the intentions to alter testing criteria too. The Administrator responded by issuing a new notice applying to testing changes and the appellants again made written comments which this time argued that the testing criteria were so closely associated with performance ones that a new rule-making proceeding should be held to consider amendments to both topics together. But the Administrator rejected the appellants' suggestion and issued rules altering both performance and testing criteria. Thereupon the appellants challenged the rules claiming that notice had not been given regarding an intention to alter performance criteria. On appeal, before the Federal Court of Appeals Washington D.C. (where the majority of these cases are determined) Gibbons J.

held that the second notice did not cover intended changes in performance criteria and, "the fact that some knowledgeable manufacturers appreciated the intimate relationship between the permissible failure rate provisions and the performance criteria, and so responded is not relevant."[65] Consequently he declared the rules void and required the Administrator to repeat the rule-making process comprehensively. From this case it is clear that the courts now take a stringent attitude towards the notice obligations and the fact that a particular publication is adequate for many, but not all, of the interested parties is not likely to satisfy the judges. Therefore we should not be surprised to learn that in the later case of Portland Cement Association v Ruckelshaus[66] a rule purporting to define pollution levels was struck down because the agency's test methodology was not included in the notice details. Levental J. stated that, "it is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that, to a critical degree, is known only to the agency."[67]

Judicial consideration of section 553(c)'s "comment" requirements brings to the surface the judges' concern that the Act allows agencies a broad choice of public participation mechanisms and that often those used do not enable affected citizens to make adequate representations. As a result the cases demonstrate various ways in which the courts have sought to increase the procedural opportunities for participating, though it is always necessary to remember that procedural challenges may be mere covert attempts to undermine the agencies' substantive policies.

In Walter Holm and Co. v Hardin [68] the appellants were tomato importers who sought to challenge a tomato marketing regulation issued by the Secretary of Agriculture under the Agricultural Marketing Agreement Act 1937. The Act provided that when an order regulated the size of domestic tomatoes it automatically applied to imported ones. Advising the Secretary was a committee nominated by domestic procedures, and in 1969 they recommended a minimum size for tomatoes. The Secretary then gave notice of a proposed rule embodying that suggestion together with inviting written comments. Eventually a rule incorporating the recommended standard was promulgated and then the appellants challenged the rule claiming that they should have been afforded the opportunity to make oral representations. Levental J. agreed with their claim:

> "This conclusion is undergirded by basic considerations of fairness arising out of the framework of the restriction, a statutory pattern of self regulation by industry ... The essential point is that a procedure not requiring an opportunity for oral presentation to the Department on crucial matters, and not requiring evidence in the record, is a seedbed for the weed of industry domination ... the oral hearing may be legislative in type, although fairness may require an opportunity for cross examination on the crucial issues."[69]

Therefore he granted a declaration that the appellants were entitled to such a hearing. What is interesting about the judgment is that it was given almost without mention of the requirements of the A.P.A. and the Secretary's discretion under subsection 553(c). Instead an exceedingly vague common law notions of "fairness"[70] was the main foundation of the comment procedure required. However, one explanation for the decisions may be that the facts of the case had heavy undertones of

domestic trade protectionism and therefore the court was merely counterbalancing them by increasing the procedural obligations of the Secretary.

In Mobil Oil Co. v Federal Power Commission [71] the controversy centred around a rule establishing rates for the transportation of liquid and liquefiable hydrocarbons in natural gas pipelines. The comment procedure had been rather erratic and consisted mainly of two conferences at which interested businesses discussed various transportation costs. After the appellant's contention that formal rule-making should have been observed was rejected by the court, they claimed that the Natural Gas Act's provision that the rule be supported by "substantial evidence" required more than basic section 553 procedures. The court accepted that proposition and concluded,

> " ... an examination of the purposes and provisions of the substantive statute being administered may require that more than the comparatively feeble protections of section 553 of the A.P.A. may be called for." [72]

That was a very vital development as it enabled the court to increase the procedural obligations of the agency via a supposed interpretation of the specific power-conferring statute. The extent to which such interpretations can be a product of judicial creativity was amply illustrated by the subsequent development of the judgment. Wilkey J. considered, " ... the type of procedure is related and proportionate to the degree of evidentiary support required for the agency's decision." [73] Consequently as the National Gas Act imposed the "substantive evidence" standard of judicial review, which is normally

associated with adjudicating determinations, he inferred a need for greater adjudicative techniques than mere conferences. Furthermore he felt the ancillary common law requirement of a "whole record" also necessitated higher procedural obligations as,

> "informal comment simply cannot create a record that satisfies the substantial evidence test ... (which requires) the process of testing and illumination ordinarily associated with adversary, adjudicative procedures."[74]

Therefore, as the Commission's procedure had failed to meet these demands he remanded the rule back for further proceedings in accordance with the judgment.

Again in International Harvester Co. v Ruckelshaus[75] the rule-making procedure was detailed by a specific statute, in that case the Clean Air Act 1970, by which Congress had provided that from 1975 pollution emitted through car exhausts should be reduced by ninety percent from their 1970 levels; but this requirement could be delayed for one year on petition to the Administrator of the Environmental Protection Agency. After an oral hearing at which legal representation was allowed but cross-examination prohibited, the Administrator declined to authorise the suspension of the standard. Thereupon the appellants challenged the Administrator's procedure claiming inter alia, that cross-examination should have been allowed. Levental J. reacted by pointing out that the 1970 Act's procedure was designed to ensure expeditious rule-making; therefore, he distinguished between a general right of cross-examination and a more limited form confined to " ... critical

points where the general procedure proved inadequate to probe 'soft' and sensitive subjects and witnesses."[76] In the particular case he decided that the Administrator should have allowed such limited cross-examination, and therefore he upheld the appellants' challenge. This case repeats the judiciary's concern that informal rule-making proceedings excluding the basic elements of court trials may fail to provide adequate and effective public participation.

To summarise the above decisions on comment requirements, it seems the courts are willing to utilize almost any conceivable device, ranging from ambiguous common law concepts like the "whole record" to tenuous statutory interpretations, in order to increase the procedural obligations upon agencies. Even if such a tendency could be sympathised with when it was motivated purely by a conclusion that section 553 was failing to provide sufficient public input into administrative rule-making, the judiciary's constant equating of effective public participation with adjudicatory techniques raises serious questions about their organisational expertise, as mechanisms like cross-examination may practically exclude many parties who cannot afford legal representation. It must however be recognised that participation is usually via collective bodies,[77] hence the dominance of trade associations and large business entities in the actions for judicial review of agencies' rule-making.

As for the demand in subsection 553(b) that a concise general statement of the basis and purpose of the rule be

provided this was considered in the case of Automotive Parts and Accessories Association v Boyd.[78] There the Secretary for Transport had issued a rule requiring cars to be fitted with head restraints as standard equipment. The appellants, who feared their members would lose trade as a result, challenged the rule, inter alia, on the ground that its concise statement was insufficient. In reply McGowan J. gave a " ... caution against an overly literal reading of the statutory terms 'concise' and 'general' ... (as the statement must) ... enable us to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did."[79] But there he felt the Secretary's statement complied with these standards. However, in Kennecot Copper Co. v Environmental Protection Agency[80] the court reverted to its Mobil technique of interpreting a specific enabling statute as requiring a higher standard of compliance. The Administrator of the agency had promulgated a rule establishing an "air quality standard" for sulphur oxides pollution and the appellants responded by alleging that his concise statement did not satisfy the judicial review provisions of the Clean Air Act 1970. Levental J. decided that although the Administrator's statement satisfied the demands of section 553,

> "There are contexts, however, contexts of fact, statutory framework, and nature of action, in which the minimum requirements of the A.P.A. may not be sufficient. (And this was one because) The provisions for statutory judicial review contemplates some disclosure of the basis of the agency's action."[81]

Therefore, he upheld the appellant's challenge.

The two preceding cases adequately demonstrate that the courts do not take the concise statement requirement lightly and if it is not sufficiently comprehensive this will invalidate the whole rule-making process. Additionally the substance of the statement allows the courts to scrutinise the particular agency's thinking to ensure that it is not "arbitrary or irrational"[82] and "unreasoned"[83], otherwise these defects will also undermine the rule's validity.

It is now appropriate to consider the judiciary's reactions to the exceptions from section 553. Davis notes[84] that the largest area of exceptions cover non-legislative rules (i.e. interpretative, procedural and general statements of policy) (s.553 (b)(A)). Later in this chapter we shall be examining interpretative and procedural rules but here we will concentrate upon general statements of policy. These provisions appear to have many similarities with our administrative guidance, including the fact that whilst they do not establish statutory norms they are of central importance in the exercise of discretionary powers by bureaucratic organisations, as the case of Noel v Chapman[85] highlights. The dispute concerned the power of District Directors in the Immigration and Naturalisation Service to grant voluntary departures to deportable aliens under the Immigration and Nationality Act 1952. Up until 1972 the New York District Director had followed a liberal policy in exercising that power by granting a voluntary departure to deportable aliens who were married to resident aliens, with the effect that the deportable spouse was given time to apply for, and obtain, a visa to remain in the

U.S.A. After Congressional pressure had been exerted on the service they issued a policy statement to their Directors stating that they should not routinely grant voluntary departures. The New York Director applied the policy statement to the appellant, who challenged its legality claiming that the statement was really a legislative rule which should have been subject to notice and comment proceedings. Mulligan J. noted that,

> " ... the distinctions between a rule as defined in s.551(4) which must be published, and a "general statement of policy", which is not defined in the Act, is enshrouded in considerable smog ... ".[86]

But they could be separated, as general statements of policy were primarily directed at instructing the staff of an agency in the exercise of discretionary powers and did not confer or impose legal rights or duties on citizens. Applying that test to the facts of the case Mulligan J. stated, "we construe the instruction to be simply a statement by the agency of its general policy as a guideline to the District Directors. We cannot conclude that the instructions at issue here changed the existing right of the appellants to have their applications for extensions of time to depart authorised in the sole discretion of the District Director."[87] Therefore the appeal was dismissed. It appears that in the above context the court did not want to become involved in the policy-making of the Service and consequently applied a definition of policy statements which was based upon a rigid demarcation between the legal and administrative effects of such statements. However, in

practical terms the relevant policy statement seems to have been as influential upon the decision-making of the District Director as a legislative rule would have been.

There are dicta suggesting judicial responses towards the substance of policy statements. For example in Pacific Gas and Electric Co. v. Federal Power Commission [88] the challenge was to a 'statement of policy' issued by the respondents. Because of the possible natural gas shortage the respondent Commission had asked pipeline companies how they would react towards a hypothetical shortage. Some had replied that they would give priority to contractual agreements whilst others had emphasised the significance of the uses of the fuel. Subsequently the Commission issued their policy statement in which they said priority ought to be given according to the uses of the gas. Then the appellant company, who were pipeline customers, sought judicial review of the statement claiming, inter alia, that it was a legislative rule and should have been promulgated via the procedure of section 553. The court rejected that argument because the statement " ... is neither a rule nor a precedent but is merely an announcement to the public of the policy which the agency hope to implement in future rule-makings or adjudications."[89] Nevertheless the judgement continued to elaborate upon the differences between a court's respect for a legislative rule produced through informal rule-making and a policy statement which,

"... is entitled to less deference than a decision expressed as a rule or an adjudicative order ... the reviewing court has some leeway to assess the underlying wisdom of the policy..."[90].

Therefore, it seems possible that in certain instances an affected citizen might be able to succeed in challenging the merits of a policy statement through an action for judicial review.

Another important exception, which has already been briefly mentioned, from the procedural obligations of section 553 covers rules of all three functional categories dealing with social welfare matters (s.553(a)(2)). Some of the difficulties affected citizens may face in challenging the legality of such rules due to the breadth of the above exception are demonstrated in the case of Morton v Ruiz [91]. There the respondent was a full blood Indian who had lived near the reservation for twenty seven years. He had claimed general assistance benefit from the Bureau of Indian Affairs who acting on an internal directive had refused him the benefit because he did not live "on the reservation". The respondent then sought to challenge the lawfulness of that interpretation of the Snyder Act 1921. Blackmun J. in the Supreme Court agreed with the respondent's argument that Congress' intention had been for assistance benefit to be available to Indians living "in or near the reservation." However, the Secretary of the Interior then claimed that the unpublished directive was in fact a legislative rule which was binding on the Court and the respondent. The Justices accepted that contention based upon an enabling Act passed in 1834. Furthermore they had to acknowledge that section 553 did not apply to the directive despite their collective view that,

> "the A.P.A. was adopted to provide, inter alia, that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished ad hoc determinations."92

All the court could do was to refuse to uphold the secret directive in the respondent's case because it had not been published in accordance with the publicity requirements of the Freedom of Information Act, Section 552. Therefore, the case reveals how agencies on occasions may not clearly indicate the legal nature of an administrative rule in order to exploit the ensuing ambiguity as a device to shield their determinations from judicial review.

The courts have been more successful in limiting the scope of the general escape clause contained in subsection 553(b)(3)(B). For example, in Detroit Edison Co. v. Environmental Protection Agency [93] the respondents had approved a state air quality standards plan which allowed a temporary exception for sulphur dioxide pollution, then several months later they "clarified" the plan to omit this exception. When the appellants challenged this alteration the respondents argued that notice and comment was not required as the change came within the above head of being "unnecessary". However, Peck J. held thatthe exception was "... inapplicable as well because of the substantial impact of the regulation in issue."[94] Considering the potential breadth of the nebulous concept of substantial impact, which the judge did not elaborate, the courts seem to have invented a power mechanism to prevent abuse of this escape clause. As for whether it will be helpful in deterring agency abuses only time will tell.

To summarise the general trends in recent judicial attitudes (led by the Court of Appeals for the District of Columbia) towards informal rule-making, they have been directed primarily at increasing the

opportunities and effectiveness of public participation and strengthening judicial scrutiny of agency reasoning. The latter response has concentrated upon ensuring that the "concise general statement of the rules' basis and purpose" is sufficiently detailed to enable judicial review of the "rationality" of the agency's reasoning (as in Automotive Parts) and therefore marks the demise of judicial deference to agency rule formulation found in Pacific Box. In the former trend the judges have demanded strict compliance with the notice requirements of section 553 (e.g. Wagner), combined with a creative attitude towards comment proceedings which has resulted in the emergence of various hybrid procedures initially derived from section 553 but then expanded through the addition of adjudicative elements, particularly cross-examination (e.g. International Harvester). Legitimacy has been sought for these judicial reforms of comment proceedings by invoking common law concepts such as fairness (e.g. Walter Holm), or by claims of interpretation of specific enabling statues (e.g. Mobil).

The desirability of the above developments has now been explicitly considered by the judiciary in both their unofficial and official capacities. Judge McGowan, writing in the Tulane Law Review, argued that Congress created the agencies because of is own deficiences in technical expertise; therefore, it can only have provided for judicial review as an application of the judiciary's procedural knowledge, because,

> "If the principal purpose of judicial review of agency action is thought to reside in assuming procedural fair play and reasoned decision-making, then we have an expertise to bring to bear that does not derogate from the expertise the agency members should have in their particular fields."[95]

Consequently he advocates the exercise of forceful procedural supervision by the courts over agency rule-making, and fears that the Supreme Court's recent attempt to limit judicial procedural innovation will lead to substantive intervention instead. But at the opposite pole stands Judge Wright who terms the judiciary's imposition of procedural obligations going beyond the spirit of section 553 "ad hoc review" because nobody knows what procedural obligations will be demanded until the Court considers that particular rule-making exercise. He criticises that judicial response to the A.P.A. for creating a situation of procedural uncertainty in which all agencies tend to adopt formal procedures as the only sure way of avoiding judicial refusal to uphold their rules. Furthermore he rejects McGowan's belief that judges have relevant procedural knowledge; in his words despite the fact that,

> "... we may have a professional attachment to cross examination and oral argument, we have no special expertise in the procedure appropriate to bureaucratic policymaking."[96]

The Supreme Court has supported Wright's viewpoint in the case of Vermont Yankee Nuclear Power Corp. v Natural Resources Defense Council Inc.[97] There the Nuclear Regulatory Commission had given notice of their intention to promulgate a rule governing nuclear power stations' radioactive waste products. They invited written comments, with forty parties responding, and also held a two day oral hearing at which legal representation, but not cross-examination, was allowed. Before

the final rule was issued the Commission approved the appellant's operating licence in respect of a nuclear power station in Vermont. The respondents, an environmental pressure group, subsequently challenged both the operating licence and the legislative rule in the courts. On appeal the District of Columbia Court of Appeals directed their attention to the rule-making procedure followed by the Commission and concluded that it was not sufficiently comprehensive, with the result that they remanded the rule back to the Commission for further proceedings. But the appellant contested this finding before the Supreme Court where it was argued that the Court of Appeals had unlawfully added to section 553's requirements. Justice Rehnquist replied that,

> "... generally speaking (s.553) of the Act established the maximum procedural requirements which Congress was willing to have the Courts impose upon agencies conducting rule-making procedures ... Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them."[98]

In his opinion that would only occur in the exceptional case where a rule had an individual effect and thereby came within the Bi Metallic concept of adjudication which would then trigger constitutional "due process" requirements. On the facts of this case the lower court had not been justified in demanding procedural steps going beyond section 553 and consequently the appeal was allowed.

Rehnquist's judgement may not have conclusively settled the question of judicial additions to section 553 as it did not address the issue of judicial interpretations of specific enabling statutes and as we saw earlier these are sometimes invoked as a foundation for such extensions. Therefore, the reasoning leaves a potentially large gap through which the proverbial coach and horses of judicial creativity may yet emerge. Additionally the District of Columbia Court of Appeals has recently been reviving and expanding the relevance of other aspects of the due process concept to informal rule-making[99] which would allow another avenue for circumventing Vermont Yankee. For those reasons it would take a bold person to state categorically that the high point in judicial development of informal rule-making has been reached, but, however the judges react to section 553 in the future its present requirements and the nature of existing judicial attitudes towards such rule-making are distinctly more stringent than they were fifteen years ago when Davis praised the procedure in "Discretionary Justice".

(b) Formal Rule-Making Sections 556-557

The A.P.A.'s alternative and antithetical model of legislative rule-making is the procedure of formal rule-making which essentially revolves around a full evidentiary hearing. After notice of proposed rule-making has been given the agency must generally allow affected persons to present their comments "by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a

full and true disclosure of the facts". (s.556(d)). This trial type hearing will normally take place before an Administrative Law Judge (formerly designated as a Hearing Examiner) who is a full-time civil servant employed and organised independently of the agency engaged in the particular rule-making exercise. He usually makes a tentative decision, on the basis of the hearing transcript and other filed documents, as to whether the agency has established by 'substantive evidence' on the whole record factual and legal support for their proposed rule. Subsequently the agency can either confirm or amend his tentative determination, but their decision must also be based solely upon the record and be supported by substantial evidence (s.557).[100] Consequently Hamilton has summarised the attributes of formal rule-making thus, "the distinction between formal and informal rule-making procedures may be analogized in a crude way to the distinction between a hearing before a legislative body and a hearing before a court."[101]

Traditionally formal rule-making could be imposed by several mechanisms which distinguished between statutes conferring rule-making powers before and after the enactment of the A.P.A. With regard to the former category it was sufficient if the enabling statute detailed a rule-making procedure similar to sections 556-557; for example s.70 1(e) of the Food Drug and Cosmetic Act 1938 established a procedure initially based upon informal rule-making which could then be escalated into a formal procedure if an interested person objected to any specific portion of the proposed rule. In the case of post A.P.A. enabling statutes, that Act provides by section 553(c) "when rules are required by statute to be made on the record after

opportunity for an agency hearing, sections 556 and 557 of this title apply" so the key to invoking formal rule-making is to be found in the wording of the specific enabling statute. During the early years of the A.P.A. the courts took a generous view of presumed congressional intent to invoke sections 556-557 but that judicial attitude has recently been dramatically reversed, as will now be shown.

In U.S. v Allegheny Ludlum Steel Corp.[102] the basic issue was whether the Esch Car Services Act 1917 (which had been amended in 1966) used language sufficient to invoke sections 556-557. By section 1 the 1917 Act provided that "after hearing" the Interstate Commerce Commission could issue "reasonable" rules regulating railroad freight car services. At the turn of the century the railroad companies had produced a code of practice which required freight cars to be promptly returned to their owning line when emptied. However, in practice cars were not returned expeditiously and therefore no individual railroad invested much money in freight cars. Consequently by the Nineteen Sixties a national freight car shortage had developed. After an investigation in 1963 the I.C.C. gave notice of a proposed legislative rule enacting the code of practice in statutory form. An oral hearing was held for fifty days at which affected parties could be legally represented but where cross-examination was prohibited. Later a final rule was promulgated which required the speedy returning of freight cars. The respondents challenged the validity of this rule claiming, inter alia, that the procedure should have conformed to sections 556-557. When the case reached the Supreme Court Justice Rehnquist ruled by stating that "sections

556 and 557 need be applied only where the agency statute, in addition to providing a hearing prescribes explicitly that it be 'on the record'."[103] He later appeared to modify this literal requirement by adding, "we do not suggest that only the precise words 'on the record' in the applicable statute will suffice to make s.556 and s.557 applicable.[104] Nevertheless, he then went on to hold that the Esch Act's wording did not indicate a congressional intent to invoke formal rule-making.

A year later in US v Florida East Coast Railway Co. [105] the Supreme Court was faced with another exercise of the Esch Act's rule-making powers which this time concerned the imposition of a per diem charge on railroads using other companies' freight cars. Thus, after Senate criticism for delay, the ICC had given notice of proposed rule-making with only the opportunity for written comments being provided. When the final rule had been promulgated the respondents raised an action claiming that the rule-making procedure should either have conformed to section 556 or at least have involved an oral hearing. Justice Rehnquist, speaking for the majority, repeated his views given in Allegheny that the Esch Act's wording did not trigger section 556. Furthermore he then dismissed the respondent's claim that 'after hearing' demanded a legislative type oral hearing. This strange conclusion was justified by the argument that as the Act had been amended in 1966 the requirements of a 'hearing' should be defined with regard to the A.P.A. As Rehnquist J. had already determined that section 556 did not apply, the relevant provision had to be section 553 which allowed purely written representations. Consequently the Commission's rule-making procedures were lawful.

From the two cases above it is apparent that the Supreme Court has now decided to adopt a strict approach to the invoking of sections 556-557. Although it proclaims that the literal 'trigger' words of section 553(c) are not needed, in both cases it refused to allow similar words to have that effect and in neither case did Justice Rehnquist even hint at what other forms of wording would suffice. Additionally his unduly restrictive attitude towards the procedural content of a 'hearing' in Florida hardly suggests future judicial generosity in the more burdensome area of formal rule-making.[106] Perhaps it is possible to justify and explain the Court's desire to limit the imposition of formal rule-making upon agencies in terms of the onerous and deleterious effect this might have on the process of rule-making. After a wide ranging investigation into the impact of formal rule-making upon agencies (which revealed some horrifying statistics e.g. the average time period for rule-making under section 701 Food Drug and Cosmetic Act 1938 was four years) Hamilton concluded,

> "in practice, therefore the principal effect of imposing rule-making on a record has often been the dilution of the regulating process rather than the protection of persons from arbitrary action."[102]

Consequently it appears that the Courts have sought to reduce the situations in which legislative rule-making requires sections 556-557 procedures, whilst at the same time increasing the obligations and stringency of section 553's requirements.

(2) Interpretative Rules

As with the other functional categories of rules the A.P.A. utilizes the category of interpretative rules to establish procedural obligations without defining its meaning or content. Therefore, it is necessary to search elsewhere for a working definition. In Schwartz's view, "interpretative rules are statements as to what the agency thinks a statute or regulation means, they are statements issued to advise the public of the agency's construction of the law it administers."[108] From this definition it is possible to abstract the three important characteristics of interpretative rules. First, unlike legislative rules, they do not require any express delegation of power from Congress, instead they have their foundations in the general responsibility of an agency to administer a particular statutory scheme. As Davis explains, "no government in the worldcan or does operate without administration, and an inescapable part of administration is to give meaning to the law that the administrators are carrying out ..."[109] In that light promulgating interpretative rules is seen as an inherent function of the administration. Leading on from the above characteristic is the element of publicity, which is based upon section 552(a)(1)(d) of the A.P.A., and requires the publication of "interpretations of general applicability formulated and adopted by the agency" in the Federal Register.[110] Presumably as interpretative rules are meant to be the product of agency thinking and experience Congress determined that public participation in their formulation is not necessary and therefore exempted them from the procedural obligations of section 553. But the requirement of publicity does enable the public to comprehend and where appropriate challenge agency interpretations either inside or outside the courts. This

factor highlights the third characteristic of interpretative rules and that is their preliminary and conditional nature. As has already been explained interpretative rules are the agency's view of the law but ultimate responsibility for determining these questions obviously rests with the courts. Such rules, therefore, are always liable to be overturned through a judicial determination of the true meaning of the statute or legislative rule, although it must be recognised that the practical and financial costs involved in seeking an authoritative judicial ruling may be a considerable deterrent against that form of challenge. Also the creation of expert agencies by Congress raises expectations that some degree of judicial respect for agency interpretations will be given. Consequently the dominant theme in the consideration of these rules by the courts has been to define the nature of, and factors affecting, judicial deference to interpretative rules.

The leading case on judicial attitudes towards interpretative rules is Skidmore v Swift Co.[111] There the appellants were part-time night firemen for the respondent company who claimed that their time spent at the fire station amounted to "working time" within the meaning of the Fair Labor Standards Act. Before the Supreme Court the major issue was the weight to be given to interpretations of "working time" by the relevant agency Administrator. Justice Jackson noted that the Administrator's interpretations had no statutory authority and were not reached via adjudicatory procedures, but they "... are made in pursuance of official duty based upon more specialised experience and broader investigations and information than is likely to come to a judge in a particular case." Therefore, he decided that the interpretations,

> "... do constitute a body of experience and informed judgement to which courts and litigants may properly resort for guidance. The weight of such a judgement in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency and its power to persuade, if lacking power to control."[103]

After applying these criteria to the Administrator's interpretations he held that there was nothing in law preventing the appellants' night work from amounting to "working time".

The comprehensiveness of Justice Jackson's evaluation of interpretative rules was acknowledged thirty two years later in the case of General Electric Co. v Gilbert [114] The action concerned a claim that the appellant's sickness insurance scheme violated Title Eight of the Civil Rights Act 1964 (prohibiting inter alia sex discrimination in employment) by excluding pregnancy from its coverage. One fundamental argument of the respondent was that a 'guideline' issued by the Equal Employment Opportunity Commission interpreted Title Eight as requiring sickness insurance schemes to cover pregnancy. Justice Rehnquist replied, "in short, while we do not wholly discount the weight to be given the 1972 guideline it does not receive high marks when judged by the standards enunciated in Skidmore" [115], particularly because it was contrary to an earlier E.E.O.C. interpretation of the Act. Furthermore he believed that a contemporaneous interpretation, which this was not, would deserve greater judicial deference. Therefore, the majority of the court refused to follow the agency's interpretation and declared that the appellant had not violated the statute.

Another significant case was Udall v Tallman [116] where the legality of licences for oil and gas bases in Alaska was challenged. During 1942 the President had created a Moose Range by Executive Order which prohibited "settlement, location, sale or entry, or other disposition", but the Secretary of the Interior had interpreted that legislative rule as not disabling himself from granting mineral leases in respect of areas within the range. Despite the fact that the Secretary's interpretation had not been embodied within an official rule Chief Justice Warren thought that it deserved judicial cognisance because it "... had, long prior to respondent's application been a matter of public record and discussion."[117] Moreover the interpretation merited judicial respect as, "when the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order."[118] Therefore, he accepted the Secretary's interpretation of the President's Order and upheld the relevant mineral lease applications. Presumably the decision was motivated by a belief that one part of the Executive branch of government was in a better position to know the intention of another part than the judiciary. While that may be so, caution must still be observed to ensure that the Executive does not become overpowerful as both legislator and judge in respect of strategic areas of citizens' lives.

To summarise the judicial response towards interpretative rules, the Supreme Court's main concern has been to establish a framework within which they can assess the weight to be given to any particular agency's interpretation of a statute or legislative rule. In the evolving case law they have

articulated a catalogue of factors which induce judicial respect for interpretative rules, but ultimately these provide few limitations on the judiciary's power to replace the substance of interpretative rules with their own views. However, the judges do not appear to have abused their authority and content themselves with ensuring that agency interpretations remain inside a zone of reasonableness.

(3) Procedural Rules The function of this category of administrative rules is to establish the procedures to be observed by the promulgating agency when carrying out its administrative tasks. As with interpretative rules no express delegation of power from Congress is required for the issuing of procedural rules, and that principle was confirmed in the early case of U.S. v Bailey.[119] Procedural rules are also similar to interpretative ones in that the A.P.A. does not require their formulation to be subject to section 553's notice and comment duties. The most likely explanation for this exception is to be found in an extension of the argument used to restrict judicial additions to the procedure of informal rule-making, namely that expert agencies are the most qualified bodies to determine their own procedures. The outcome was that Congress decided public participation in the creation of procedural rules was unnecessary (A.P.A. s.553(1)(D)). But they are required to be published in the Federal Register (A.P.A. s.552(A)(1))(c)).

When the existence of procedural rules is central to the deliberations of the higher Federal courts two major issues generally arise; these are the extent, and basis, of judicial enforcement of such rules. In the leading case of Vitarelli v Seaton [120] the Supreme Court was faced with a victim of the

McCarthy era. After having been employed for two years as an Education Advisor in the Interior Department the appellant was suspended from duty for allegedly being in sympathetic association with three persons alleged to have been members of the Communist Party. Under a Departmental Order the Secretary had provided a hearing procedure for employees suspended in the interests of national security which required (a) the employee to be given as specific information about the charges laid against him as security interests allowed, (b) the restriction of the hearing to relevant matters and (c) the employee to be allowed to engage in limited cross-examination of adverse witnesses. At the appellant's hearing all the above requirements were violated and he, therefore, challenged the lawfulness of those proceedings before the courts. In the Supreme Court Justice Harlan noted that, "having chosen to proceed against the petitioner on security grounds the Secretary here ... was bound by the regulations which he himself had promulgated for dealing with such cases, even though without such regulations he could have discharged the petitioner summarily."[121] His foundation for strictly enforcing the Secretary's rule was to be located within the nature of national security hearings because, "... scrupulous observance of departmental procedural safeguards is clearly of particular importance."[122] However, Justice Frankfurter based his judgement on the more general belief that, "an Executive agency must be rigorously held to the standards by which it professes its action to be judged."[123] Obviously the latter approach with its overtones of administrative morality offers the possibility of wider application beyond the context of national security employment hearings, and indeed subsequent cases demonstrate this.

Twelve years later in U.S. v Heffner [124] the Court of Appeals shed new light on the rationale of Frankfurter J. regarding the judicial enforcement of procedural rules and extended its scope over the format of rules of which the courts would take cognisance. There the appellant was an emotionally disturbed man who believed he had been subject to a conspiracy by the government and former business associates. After requesting official help without success, he claimed a number of tax benefits that he was not eligible for in order to gain governmental attention. He was then interviewed by Internal Revenue Service Special Agents, who have the responsibility of investigating possible criminal prosecutions, but was not told of their functions or his right to legal representation. Subsequently in an unrelated press index the I.R.S. stated that Special Agents would in future notify suspects of those facts. Despite this requirement, when the appellant was again interviewed by these agents they did not comply with the announced procedural rules. Subsequently the appellant claimed that the evidence obtained in breach of those rules was inadmissible in court. Winter J. began by summarising Vitarelli, adding that in his opinion judicial enforcement of procedural rules was desirable "... to prevent the arbitrariness which is inherently characteristic of an agency's violation of its own procedures."[125] This approach complements Frankfurter's reasoning as it is prima facie arbitrary for an agency to break its procedural promises. Furthermore the Court of Appeals was willing to take note of procedural rules even when they were incorporated in informal documentation, "nor does it matter that these I.R.S. instructions to Special Agents were not promulgated

in something formally labelled a 'Regulation' or adopted with strict regard to the A.P.A."[126] This was a progressive step as it prevents agencies from being able to circumvent their own rules via a choice of publication mechanisms.

From the cases above it can be seen that the courts have been willing to hold agencies to their procedural declarations where they add to citizens' constitutional and statutory protections. Nevertheless it is probably no coincidence that these decisions concern procedural rules governing disciplinary, and investigative, decision-making processes both of which fall within the heartland of "due process" jurisprudence. Only the future will disclose whether the judiciary are ambitious enough to extend the preceding doctrines across other areas of the administrative process.

Conclusion

To provide an overview of the trends in judicial responses to the various categories of administrative rules, these fall into two broad groups. Regarding interpretative and procedural rules the judges have concentrated upon refining and evolving the principles declared in the innovative cases of Skidmore (detailing factors which encourage judicial deference to agency interpretations of statute law) and Vitarelli (expressing judicial willingness to demand that an agency observe its procedural rules where they increase the rights of citizens). However, the reaction towards legislative rules can best be described as involving asymmetrical evolution. Agency use of formal rule-making has now been forcefully discouraged in Allegheny and Florida, whilst the District and Federal Courts of Appeal have simultaneously been seeking to strengthen the duties associated with informal rule-making (Walter Holm, Mobil Oil and

International Harvester, etc.). Against this background it is, therefore, chilling to note Gellhorn and Robinson's prediction,

> "We do think it likely that present trends, if continued, will cause some shift from rule-making back to adjudication ... as open power becomes vulnerable to attack, it may be to an agency's advantage to employ less visible methods of applying its delegated power."[127]

The first deduction to be made from the above examination is that the American idea of administrative rule-making stretches far beyond the realms of provisions which are analogous to what we have termed administrative guidance and encompasses all rules made by administrative agencies. Therefore, considering the legal and practical significance of agencies' legislative rules we should not be surprised to discover that the A.P.A. is primarily concerned to establish the procedures required for the lawful creation of that category of administrative rules. The exceptions to section 553 mean that those types of administrative rules which share similar characteristics to administrative guidance (particularly the absence of a direct statutory basis) namely general statements of policy, interpretative and procedural rules, are not subject to any mandatory opportunities for public participation in their formulation. Yet as the case law revealed they also dealt with important areas of governmental activity, e.g. immigration in

Noel, conservation of the environment in Udall and the administrative investigation of suspected criminal conduct in Heffner. Consequently the impact of these rules on government-citizen relations explains why Davis was keen to argue that they too should be subject to the procedure of informal rule-making too. However, that call has largely gone unheeded as the Federal courts have concentrated upon increasing the obligations of agencies using informal rule-making, whilst Congress has subjected specific agencies to hybrid procedures in individual enabling acts (e.g. the Natural Gas Pipeline Safety Act 1968 which required the Federal Power Commission to promulgate legislative rules via informal rule-making with an 'oral public hearing' incorporated in the procedure). But neither the Federal Courts nor Congress have made a move to curtail the wide exceptions to section 533. Instead it has mainly been the State courts who have sought to promote the use of administrative rule-making procedures involving public participation as a mechanism for the promulgation of provisions comparable to administrative guidance in sporadic cases.[128] This development is clearly demonstrated in the case of Sun Ray Drive-in Dairy Inc. v. Oregon Liquor Control Commission [129], where the appellant challenged the Commission's refusal to grant it a store liquor licence on the ground that the Commission had not produced any administrative rules to govern the application of their licensing power. Tanzer J. found that the 'policies' of the Commission,

> "have the quality of folklore in that unwritten rules are passed on orally by culture carriers from one generation of employees to another, from one level of employees to another, without the stabilizing effect of the written word."[130]

He determined that this conduct was unlawful as the State legislature's action of delegating the licensing power to the Commission required them to produce policy guidelines via a process of public rule-making. Furthermore the Court, inter alia, found the following benefits of public policy guidelines,

> "... they help assure public confidence that the agency acts by rules and not from whim or corrupt motivation ... an applicant for a license should be able to know the standards by which his application will be judged before going to the expense in time, investment and legal fees necessary to make application ... written standards and policies are essential to assure an acceptable degree of consistency of practice among the personnel of the agency ... written standards enable the decision-making body, in this case the Commission, to make its decisions by rule of law rather than for subjective or ad hominem reasons."[131]

Nevertheless the judiciary at both state and federal levels have much work to do if these ideals are to gain universal legal and administrative recognition.

Although the Federal A.P.A. does not require public participation in the creation of general statements of policy, interpretative or procedural rules, section 552 obliges agencies to publish these provisions. As the case of Morton v Ruiz revealed, where an agency fails to observe that requirement the courts can apply the sanction of refusing to give legal effect to the provision. However, the case can also be viewed from the alternative perspective as highlighting official disregard for

the publicity requirements of the Act, and a rejection of Davis' pleas for the virtue of openness as a basic component in the 'confining' of administrative discretions.

Within the categories of administrative rules acknowledged by the A.P.A. the courts have articulated common law principles regarding judicial cognisance of interpretative and procedural rules. These principles have maintained a viable balance between protecting the legitimate interests of citizens in being subject to fair administrative procedures and being able to rely upon reasonable agency interpretations, with the corresponding agency demands concerning acceptable areas of freedom to determine their own procedures and state those interpretations of the law which promote their official goals.

Therefore, whilst Davis saw the strengths of administrative rule-making lying in its incorporation of both public involvement and openness, Federal law, as far as provisions analogous to administrative guidance are concerned, eschews public participation and relies upon publicity to safeguard affected citizens. Now we shall discover how British law has responded.

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THE RESPONSES OF BRITISH GRIEVANCE-HANDLING AGENCIES TO ADMINISTRATIVE GUIDANCE

PRELUDE

In the ensuing three chapters we shall be analysing the ways in which the Parliamentary Commissioner for Administration (hereafter P.C.A.), the courts and Value Added Tax Tribunals (hereafter V.A.T. Tribunals) have responded to the existence and effects of administrative guidance. This task requires us to develop a classification of administrative guidance so that the subsequent analysis can coherently encompass a myriad of individual pieces of guidance. The classification must be capable of assimilating all those written provisions which fall within our definition of guidance (as outlined in Chapter One). Furthermore, the classification needs to be based upon classes which all the various grievance handling agencies recognise in order that a comparative evaluation of their responses can be undertaken. A balance has to be attained in the construction of classes which are neither too generalised with the result that significant distinctions are overlooked (e.g. classes focusing on the person to whom guidance is directed, civil servants, citizens tec.) and classes which are too particularised with the consequence that the analysis becomes unnecessarily complex (e.g. individual classes for each department's guidance). To help us in our task we shall consider whether several discrete sources of knowledge and information can contribute to the formulation of an acceptable classification.

A natural place to begin our search for possible classifications of guidance is with the departments which promulgate these provisions. Unfortunately, there appears to be no generally recognised categorisation of guidance and even an absence of consistency between departments in the nomenclature used to describe these provisions (eg. Scottish Office have termed them "guidelines"[1], the Inland Revenue referred to "departmental instructions"[2], and the Home Office to "standing orders"[3]). Therefore, we have to look elsewhere for inputs into a viable classification of guidance. Nevertheless because this research is concerned with both the legal and organisational aspects of guidance the classification eventually adopted should, if possible, be compatible with actual departmental usage of these provisions.

The second source of knowledge that we can consult is that of organisation theory. However, as we learnt in Chapter Two the different schools of thought did not place the task of classifying guidance very high on their lists of intellectual priorities. Consequently, we concluded that it was probably both erroneous and presumptive to expect different disciplines to have identical interests when examining the same phenomenon.[4] Also our classification has to focus primarily upon the ways in which the grievance-handling agencies perceive administrative guidance and that necessitates an emphasis on the "legal" attributes of these provisions (that is, those features which the persons staffing the grievance-handling agencies, many of whom were qualified lawyers, considered to be significant) and such expertise falls outside the ambit of organisation theory. Therefore, it seems that we should turn to the legal literature as the most likely source of fruitful insights into

the construction of a workable classification.

One obvious locus of knowledge is that provided by the major text-book writers. Without repeating our general overview of the literature contained in Chapter One, it can be noted that the following commentators have all made references to what we term administrative guidance, Bradley[5], Craig[6], Foulkes[7], Harlow and Rawlings[8], and Wade[9]. They mention several common examples of guidance including extra-statutory tax concessions[10] and circulars issued by departments[11], but these distinctions do not appear to be presented as the bases for classifications of guidance. The nearest the commentators come to offering a classification is Foulkes' division of "administrative rules" into classes based upon the form of documentation the rule is embodied in ie. "Ministerial and departmental statements", "Codes of practice" and "Circulars"[12]. Therefore, whilst the textbook writers' comments imply the conclusion that lawyers do not consider administrative guidance to be composed of homogeneous provisions, neither do they establish any universally recognised classification of guidance. Consequently we shall have to formulate our own classification.

The following method of classifying guidance does not pretend to be the only or definitive approach, but as the later chapters will demonstrate it does fulfil the requirements detailed at the beginning of this introduction. Instead of utilising the form of documentation in which guidance is contained as the most salient criterion of classification, our model will concentrate upon the substance of guidance. Form has been rejected because it may be merely a matter of departmental

practice whether a piece of guidance is promulgated via a booklet, a circular letter or in correspondence with an interested pressure group and such distinctions do not appear to greatly influence the relevant grievance-handling agencies. However, the function being performed by a piece of administrative guidance is a more fundamental characteristic that remains constant across a variety of forms. Hence a piece of guidance instructing staff to make a note of the address and age of all the members of the public they interview can be contained in a departmental handbook, a circular to local offices or the training notes provided on staff development courses.

There are many different functions being performed by administrative guidance, Craig notes, inter alia, regulating decision-making within bureaucracies, as an alternative to delegated legislation; and as a method of expeditious law reform[13]. Consequently our classification must select those functions which we believe offer the greatest insights into the response of all the grievance handling agencies to be examined in this thesis. The three functions selected are those of determining the procedures of decision-making; interpreting statutory language; and detailing policy objectives. Each of these functions requires the use of distinct types of expertise and recourse to varied sources of information. For example, a department promulgating new policy guidance would be placing greatest weight upon political value judgments derived from ministers as the basis for the contents of the guidance; this was clearly revealed in a report of an investigation by the P.C.A. into the disposal of surplus government land where he observed, "in August 1980, following a Government directive, the

rules altered ..."[14] (emphasis mine). Whereas interpretative guidance primarily relies upon legal knowledge derived from lawyers; as the P.C.A.'s investigation into the Post Office's interpretation of wireless licences noted, "the issue of circular 9/67 in April 1967 was a fully considered step, and rested on what was thought to be a firm legal basis."[15]. Furthermore the grievance-handling agencies examined in this thesis recognised these categories and accorded them distinct significance in their own jurisprudence. We must also acknowledge that the classes of procedural and interpretative guidance have their counterparts in United States Federal law and, as we discovered in Chapter Four, these categories have proved useful to their courts in developing a relatively coherent response to administrative guidance. Now we shall elaborate on the nature of each of our categories.

First **procedural guidance**, this category of guidance has the function of informing subordinate officials and/or persons outside the department of the form of the relevant decision-making process. An example is guidance issued by the Ministry of Transport to its inspectors instructing them how to conduct incognito inspections of authorised garages testing facilities[16]. The major source of information used to construct this type of guidance is administrative and organisational expertise, but legal ideas in the forms of the rules of Natural Justice and criminal procedure have a subsidiary role as the Customs and Excise compounding case referred to in Chapter One demonstrated[17]. Secondly, **interpretative guidance** states the department's view of what Parliament (in the case of statutes) or any other legislator (in the case of delegated legislation) meant by enacting particular

language. Although ideally departments are only considering what the legislator intended, in practice they may also be expressing their own value judgments (eg. the Dept. of Trade's interpretation of "plant and machinery" in the Industrial Development Act 1966 to include some types of wall insulation but not others[18]); however, such guidance does not purport to detail departmental policy. Turning now to our final class of guidance the heritage of U.S. law is of little direct help as it uses the category of "legislative" rules and such provisions fall outside the scope of this research as those rules have statutory force (they are broadly equivalent to our delegated legislation). But Asimow has perceptively observed that because of constitutional and cultural differences many matters which are dealt with by legislative rules in the U.S. are provided for in the U.K. by ministerial discretions subject to "guidelines" created by departments[19]. Therefore, our classification incorporates these British provisions by containing the class of **policy guidance.** Such guidance specifies the formal objectives of a departmental programme and commonly provides the detailed criteria by which individual citizens' cases are determined. One example of this type of guidance is the rules produced by the Home Office to govern the Secretary of State's statutory discretion under the Prison Rules 1964 to censor prisoners' mail (the P.C.A. found that in 1967 the guidance had been amended to prohibit prisoners corresponding with marriage bureaux and that was why the complainant's letters had been witheld[20]).

We can note

that several academic commentators have either used one of the

classes contained in our model or provided examples of guidance falling within it. When Jergesen was writing about the legal effects of administrative procedures on both sides of the Atlantic, he noted that "every administrative body spawns a variety of procedures in the course of its work" and that a major form of such procedures were "written instructions to departmental subordinates concerning the management of various matters within their competency."[21] Birkinshaw in his examination of departmental grievance resolution provides many individual examples of procedural guidance including this evidence regarding the D.H.S.S.,

> "on the supplementary benefit side there was an internal procedure specifying the grade of officer at which the complaint should be handled, whether they should be marked 'urgent' or required ministerial reply and the degree of liaison needed between head quarters in London and the local office in the rare event of head-quarters dealing with the complaint.[22]

He concluded that, "... most departments had well-defined internal processes for complaint handling"[23], thereby providing further proof of the existence of one type of procedural guidance. As for interpretative guidance Harlow and Rawlings offer the following explanation for its creation,

> "legal language is itself an important factor in driving the administrator towards informal rule-making. Expressed in terms of statute and regulation, he can no longer understand his own policies. Memoranda are not legislation; they are

necessary guides to explain the meaning of the law to the public servants who have to administer it."[24]

Which suggests that it performs a function as universal to the world of large scale administration as procedural guidance does in Jergesen's view. Regarding the class of policy guidance Galligan has noted the following occurrence,

"in vast areas of welfare, licensing and planning, similar discretionary powers are exercised repeatedly and usually by busy officials, boards, and tribunals. There is a tendency in such areas to generalise policies so that they serve not merely to decide one particular case, but to guide decisions in all cases to which they are relevant."[25].

Harlow provides us with a clear example of this organisational phenomenon at work in her elaboration of the process by which departments make ex gratia payments to individuals.

"The reports of the P.C.A. and the Commission for Local Administration show us that compensation forms part of the day to day work of administration. Nor are decisions the unreasoned 'administrative lawlessness' which they were once thought to be by lawyers. Principles and guidelines help administrators towards decisions in much the same way as precedents guide lawyers in deciding cases."[26]

This offers further verification of the existence and significance of this type of administrative guidance.

From the diverse writings mentioned above we can see that our individual classes underly the analyses of several legal scholars, but that no single commentator has sought to integrate the distinct classes into one unified classification of administrative guidance. The functions represented by these classes are also clearly detectable in actual administrative practice as can be seen in the summaries of selected investigations conducted by the P.C.A. outlined in Appendix B. And for an even closer scrutiny of administrative practice we can refer back to our case study of the Scottish Education Department's Awards Branch. There, we discovered that parts of the Branch's General Instructions fell into the class of procedural guidance as they, inter alia, specified how applications were to be processed and allocated duties between the Registry and individual Territorial Sections. Furthermore these Instructions specified the formal system of decision checking by Higher Executive Officers and Executive Officers. Interpretative guidance was present, inter alia, in the form of notes issued to H.E.O.'s defining the meaning of "ordinarily resident". During the course of the field-work the House of Lords gave their authoritative view on the meaning of this term in the context of the English delegated legislation governing student grants (in the case of R .v.Barnet L.B.C., ex p. Shah[27]) and the Branch's guidance was accordingly amended. This example showed the reliance of interpretative guidance upon legal ideas and information. Policy guidance was in part contained in the Branch Policy Minutes issued to all grades of staff. One of these minutes contained the policy on awarding grants for repeat years of study, it had recently been changed to make the conditions of eligibility much more severe in line

with the Government's attitudes; thereby exemplifying the predominance of political value judgments in this category of guidance.

Lastly the method of classifying administrative guidance used in the subsequent chapters must be explained. Guidance was allocated to one of the classes according to its predominant attributes. Therefore, if a piece of guidance set out the policies of the department it was treated as an example of policy guidance and mutatis mutandis for the other classes. However, no general classification could hope to provide completely watertight classes and hybrid pieces of guidance, which could be located in more than one class, were classified according to the appropriate grievance-handling agencies assessment of their nature. For example Home Office guidance detailed the way in which Parole Eligibility Dates were to be calculated. This guidance could be classed as either interpretative (because it explained the Department's understanding of several statutory provisions) or procedural (as it specified the way in which officials were to calculate particular prisoners' P.E.D.s). The P.C.A. treated the guidance as providing a Departmental interpretation and therefore our analysis followed his lead[28].

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8. C. Harlow and R. Rawlings, Law and Administration, p.130.
9. H.W.R. Wade, Administrative Law, p.743.
10. Commented upon by Bradley p.624, Foulkes p.66 and Wade p.743.
11. Discussed by Bradley p.625, Foulkes p.62, Harlow and Rawlings p.131, and Wade p.745.
12. Ibid. Ch. 3.
13. Ibid. p.213.
14. C.384/81 H.C.132 (1981-82) p.8.
15. C.261/68 H.C.129 (1968-69) p.98.
16. C.169/68 H.C.129 (1968-69) p.136.
17. C.486/81 H.C.8 (1982-83) p.6.
18. C.20/G H.C.290 (1972-73) p.165.
19. Michael Asinow, "Delegated Legislation: U.S. and U.K." 3 O.J.L.S. p.253.
20. C.445/68 H.C.129 (1968-69) p.47.
21. Allan D. Jergesen "The Enforcement of Administrative Procedures in G.B. and the U.S.", (1982) 30 Am. J. Comp. L., p.267.
22. Patrick Birkenshaw "Depts. of State, Citizens and the Internal Resolution of Grievances", 1985 C.J.Q., p.15 at p.28.

23. Ibid. p.45.

24. Ibid. p.126.

25. D.J. Galligan "The Nature and Function of Policies within Discretionary Power" [1976] P.L. 332 at p.333.

26. C. Harlow, Compensation and Government Torts p.118.

27. [1983] 2 W.L.R. 16.

28. C.264/G H.C.290 (1972-73) p.119.

CHAPTER FIVE

THE PARLIAMENTARY COMMISSIONER FOR ADMINISTRATION

Introduction

This chapter has two main objectives which are related to the extent that their attainment requires an examination of the same source of information, namely the reports of investigations conducted by the P.C.A.. The first aim is to obtain a more comprehensive appreciation of the prevalence and major features of administrative guidance across the whole spectrum of central government departments. Chapter Three clearly disclosed the significance of guidance for decision-making by the Awards Branch, but this thesis must also consider the generality of departments to ensure that its conclusions are not based upon a single example which is in a minority of one concerning the usage of guidance. Secondly, a selection of reports will be analysed, using the classification elaborated in the preceding prelude, to determine the ways in which the Commissioner has responded to the various types of guidance. This will hopefully contribute in a small way to the rectifying of the omission noted by Harlow and Rawlings,

"the judges rely on commentators to synthesize their decisions into sets of 'rules' and 'exceptions' capable of guiding future conduct. By contrast little interest has been shown in synthesizing ombudsman findings."[1].

As will be disclosed later, the P.C.A.'s reports do

divulge patterns and re-occuring themes in his attitude towards the status and significance of guidance in departmental decision-making, which are of importance to lawyers trying to understand the reactions of grievance-handling agencies to these provisions.

The question may be asked, why begin your consideration of the legal responses to guidance with a study of the P.C.A.? Our answer is because this office has had the most frequent and closest contact with guidance of all the agencies examined in this thesis. The proximity of encounters has undoubtedly been influenced by the formal powers of the Commissioner and the format of his investigations. By s.8(3) of the Parliamentary Commissioner Act 1967 his investigations are not to be hampered by inter alia the Official Secrets Acts or what is now termed public interest immunity[2]. Similarly s.7(2) gives the P.C.A. a wide freedom to shape his method of investigation into the form that he considers to be the most efficacious. Stacey describes the actual method developed as, "... high quality investigations in the sense that the Parliamentary Commissioner sends his investigator to the department concerned to examine the relevant files in person and, where appropriate, to interview the civil servants concerned."[3]. Consequently the P.C.A. has direct access to the guidance applicable to particular investigations and he often makes reference to it in his reports.

The investigations of the P.C.A. have two major advantages when judged from the standpoint of our research. First the jurisdiction of the P.C.A. covers all the main central government departments[4]; therefore, we have the opportunity to evaluate the utilisation of guidance in the greatest range of

administrative contexts. Secondly the reports of the P.C.A. are a practicable source of information about the general use of guidance because of their accessibility. Although since 1981 the Commissioner has returned to only publishing reports of selected investigations this is a minor restriction compared to the official attitude towards openness in government. Ponting has written, "information is seen as something to be controlled by Whitehall and allowed outside only when it is politically convenient ... Outside bodies are entitled only to receive the minimum amount of information possible."[5]. As we shall soon see the publication of guidance is at best sporadic and these reports provide the most extensive, albeit indirect, stock of information on administrative guidance available in the public domain.[6]

There are, unfortunately, certain limitations in the P.C.A.'s jurisdiction which have the effect of reducing his expose to some forms of guidance; consequently these will be noted so that they can be borne in mind when we consider the general conclusions that can be deduced from his reports. The first restriction is found in s.5(2) 1967 Act which provides that the P.C.A. should not normally investigate complaints where the person had a remedy available before a court or tribunal. In regard to his exceptional discretion to investigate complaints where the aggrieved individual had a judicial remedy the Commissioner has been fairly generous to the individual. For example in one case a landowner contested the Department of Transport's interpretation of their power to pay compensation for land which had not been compulsorily acquired. The P.C.A. said,

> "while accepting that the complainant had a legal remedy through the courts to establish the principle that the money had been wrongly witheld, and to enforce payment, I accordingly felt no inhibition about investigating these related matters or indeed the Department's general handling of their correspondence with him during the period concerned."[7].

Therefore, just because a complainant had a right of action before the courts does not mean that the P.C.A. would refuse to follow up a case involving guidance. However, he has applied an inverse approach to his identical discretion concerning complaints where the person had a remedy before a tribunal. The strictness with which he exercises this discretion was demonstrated in a complaint about the way the Customs and Excise had treated hairdressers on the introduction of V.A.T.. He declined to pursue allegations of inconsistency in Departmental decision-making because, "as there are no special circumstances in this case, I cannot enquire into the amount of rebate allowed to the complainant or other individual hairdressers."[8]. As Bradley has observed this differentiation in the P.C.A.'s invoking of section 5(2) is probably to be explained by his separate conceptions of when it is reasonable to exercise a judicial as opposed to a tribunal remedy.[9] From our perspective the effect of this restriction upon the jurisdiction of the P.C.A. has been to reduce the numbers of reports dealing with areas of departmental decision-making where aggrieved individuals possessed the right of appeal to a tribunal. Inevitably our comprehension of the significance of

administrative guidance in these areas has thereby been distorted. Two fields of administration where this distortion was very noticeable were supplementary benefits and immigration. Few investigations in these areas were reported by the P.C.A. and consequently we learnt little from him about the existence or use of guidance by the D.H.S.S. and the Home Office when carrying out these administrative tasks. However, several commentators have helped to combat our ignorance by informing us of the actual importance of guidance in these fields, including Hodge on welfare benefits[10] and Blake on the operation of the immigration system[11].

The second limitation which is of concern to us is found in s.6(1) of the Act, which prevents the P.C.A. from investigating complaints made by public bodies. Consequently his reports disclose few references to guidance regulating inter-departmental or central government - local government relations as these only come within his purview where they indirectly have an impact on individuals. For example, neighbours of a new Post Office complex complained that they had not been consulted by the Department about the development. The Commissioner discovered that development carried out under the prerogative was subject to a non-statutory procedure of consultation with local planning authorities, which had been complied with in that case[12].

Thirdly, Schedule 3 to the 1967 Act excludes a number of specific matters from the jurisdiction of the P.C.A.. Of relevance to this research are the contractual and commercial transactions of departments, because from the limited inclusion of surplus land disposal within the Commissioner's ambit a number of reports have revealed the significance of several

pieces of guidance (including the descendants of the infamous Crichel Down Code[13]) governing this activity and it may be that other guidance applies to the excluded transactions. Also under this Schedule Crown personnel decisions are withdrawn from the P.C.A.'s scrutiny and therefore the reports studied did not indicate the Commissioner encountering any of the guidance (such as the unpublished Establishment Officers Guide[14]) which seeks to control the conduct of these officials.

It must additionally be acknowledged that the P.C.A.'s reports demonstrated a considerable variation in the extent to which they elaborated upon the contents of particular pieces of guidance. In some reports he provided a precise account of their contents (e.g. on the Department of Trade's requirements for professionally unqualified auditors[15]), whereas in others he merely referred to the existence of guidance (e.g. in a case concerning the Property Services Agency he reported that, "there are also internal departmental instructions applicable to certain types of land transactions that there should be pre-sale 'good relations' consultations with the local planning authority."[16]). We can only surmise that the Commissioner published the degree of detail that he considered necessary to explain his conclusions in each particular case.

Within the constraints of this research it was not possible to read all the published reports of investigations undertaken by the P.C.A.. Therefore, a random selection was made of one annual volume of case reports from the term of office of each individual who had held that position up until the retirement of Sir Cecil Clothier in 1984. The reports were as follows, 1968 (Sir Edmund Compton), 1972-73 (Sir Alan Marre), 1977-78 (Sir Idwal Pugh) and 1982 (Sir Cecil Clothier). The first and last

volumes were composed of selected case reports, whilst the other two volumes contained reports of all cases investigated. Each volume was scrutinised for references to administrative guidance and where these were found a note was made of the particular case report (reports which only referred to pieces of guidance already encountered and which did not add anything new to our understanding of those provisions or the P.C.A.'s responses to them were discounted); a summary of these reports is contained in Appendix B.

Some of the Fundamental Features of Administrative Guidance as Disclosed by the Reports of the P.C.A.

From the table below it can be seen that policy guidance was the most common form of guidance detected in our survey, followed by procedural guidance with approximately one third fewer references, and lastly interpretative guidance having only a quarter as many occurrences.

Class of Guidance	Number of P.C.A. Reports Referring to Individual Pieces of Guidance
POLICY	33
PROCEDURAL	24
INTERPRETATIVE	8

Policy Guidance

Examples of this class of guidance were found across virtually all the departments falling within the P.C.A.'s jurisdiction, from the Ministry of Overseas Development's

rules stating eligibility for foreign income supplements[17] to the D.H.S.S.'s criteria entitling disabled persons to financial help towards the costs of running a private car[18]. With hindsight it appears that certain pieces of guidance have been controversial in their scope and application for the duration of their operative lives, a prime example being the Inland Revenue's 1971 White Paper announcing new concessions against income tax legally due but subject to a delayed assessment caused by departmental error[19], as they have continually appeared in the P.C.A.'s reports[20]. Other policy guidance has created initial opposition that has gradually diminished over time, such as the D.o.E.'s early policy on withdrawing M. o T. testing authorisation from garages that had been found to be conducting the tests improperly on just one occasion[21]. The majority of policy guidance discovered was concerned with the particular department's aims towards the public at large who came within its responsibilities, and encompassed all the major functions of the modern state including regulating conduct, providing benefits (in kind or in cash) and taxing. Consequently the guidance covered inter alia, enforcement action against company directors failing to present annual accounts[22]; backdating war pensions[23]; detailing grants for students[24]; and regulating tax concessions[25]. However a few reports also disclosed guidance relating to central - local government relationships including, the D.o E.'s policy towards removing specific items of local authority expenditure from the District Auditor's scrutiny[26], and Department of Education and Science guidance on the calculation of grants for teacher training students[27].

Another facet of policy guidance concerns the legal nature

of the governmental power to which it applies. In the survey it was discovered that twenty one references to guidance of this type related to a statutory discretion or prerogative power vested in a Minister. We have already encountered the powers to make various types of grants and to authorise garages to undertake M.o T. testing; yet in actuality the range of powers is as broad as present day public administration demands and therefore extends from the Home Secretary's authority to censor prisoners' mail provided by Rule 33 Prison Rules 1964[28] across the spectrum to his discretion to make refunds on t.v. licences granted by s.3(3) Post Office Act 1969[29]. Of the remaining references ten governed the exercise of extra-statutory discretions, which were defined as powers existing in symbiosis with a specific statutory power but not contained in an enactment. These pieces of guidance were mainly found in the field of taxation and dealt with matters such as concessions on Betterment Levy for single plot landowners[30], Capital Gains Tax on a person's main dwelling-house[31], and the miners' coal allowance[32]. The two remaining sets of guidance did not have any direct connection with statutory powers; they dealt with the distribution of compensation to British victims of Nazi persecution[33], and the ad hoc Electricity Discount Scheme for deprived persons[34]. Thus, a clear majority of the policy guidance revealed by our survey regulated the exercise of statutory powers. This is not surprising as statutes now constitute the primary source of governmental power. From the P.C.A.'s reports it would appear that most, if not all, of the major discretions vested in Ministers that are regularly exercised on a large scale have been subject to elaboration in

administrative guidance. Thus providing independent confirmation of the administrative phenomenon noted by Galligan and referred to in the prelude to this part of the thesis.

The last feature of policy guidance that will be considered is the extent of its publication and accessibility to affected persons. Our assessment must be conducted with due regard to the background of Davis' strong advocacy of "openness" as a vital constituent in the strategy of "structuring" the exercise of discretionary powers; and the conclusion reached in Chapter Four that U.S. Federal law placed greater emphasis upon the publication of provisions analogous to administrative guidance, than in requiring actual public participation in their formulation, as a democratic check on their contents and usage. Returning to our survey, only a small minority of the reports indicated that the relevant policy guidance had been made available to the public (eleven reports in total). Furthermore, the methods of publication were very diverse, thereby presumably increasing the burdens faced by affected individuals seeking to discover the existence and content of applicable guidance. The most common medium of publication was in booklets or leaflets distributed to the public. Three sets of guidance were reproduced in condensed form in such publication; they were the S.E.D.'s booklet on students allowances, the D.H.S.S.'s leaflet on financial support for disabled drivers, and the Department of Energy's booklet on the discount scheme for deprived electricity consumers. Therefore, it appears that this mechanism of publication is used where a benefit is being conferred on certain groups within society. However in two reports it was clear that the departments had notified affected individuals personally (D.oE. writing to garages informing them of the

Department's policy on the use of incognito inspections), or via their trade association (Department of Trade writing to the Shareholders Association about the former's policy concerning the publication of reports of investigations into companies). Another method of publication was through circulars (adopted by the former M.H.L.G. to detail their policy on the awarding of costs at Inquiries and the D.E.S. on the calculation of teacher training students grants) and it seems likely that this method is used where other public bodies, notably local authorities, have a direct interest in the content of the guidance along with individuals. The remaining forms of publication were extremely heterogeneous and included the presentation of the guidance to official committees (the D.o T. gave evidence on their policy regarding prosecutions under the Companies Acts to the Jenkins Committee on company law reform and the Inland Revenue submitted their guidance on the payment of taxpayers' professional costs to the Select Committee on the P.C.A.); the issuing of a White Paper outlining the guidance (the Inland Revenue's approach to the 1971 concessions on income tax); and the dissemination of guidance in a press release (the Revenue's method for announcing a concession on Capital Gains Tax liability for main dwelling-houses). We can only speculate that the departments considered that these methods had particular advantages in the context of each piece of guidance, but what is undeniable is that little has changed in the four decades since the then R.E. Megarry critically observed that,

> "speeches or replies to questions in Parliament, announcements in the press, miscellaneous official publications, letters to private organisations written by

one Government Department or another, unofficial reports and so on, may all constitute the primary sources of this quasi-law".[35]

He believed that it should be as accessible as statute and case law, and we shall have to consider the practicality and implications of such an idea later in this work.

Procedural Guidance

As the earlier table indicated, twenty four P.C.A. reports contained references to this class of guidance. The first characteristic of procedural guidance that we can examine is the type of person towards whom the relevant decision-making process was directed. Nineteen of the reports disclosed guidance regulating civil servants' conduct towards individuals whilst the minority of the reports revealed procedural guidance establishing the form of relations between departments and other public bodies (notably local authorities and public utilities). A related aspect of procedural guidance is the administrative task being governed by this class of provision. The largest group of reports (nine in total) indicated that the allocation of benefits to individuals was the most prevalent activity subject to procedural guidance. Illustrative examples of the types of benefit programmes accompanied by such guidance were the conduct of medical boards determining entitlements to war pensions[36]; the granting of aid to voluntary schools[37]; and the payment of compensation for redundancy[38]. Taxation also appeared to be an activity which was heavily governed by this form of guidance. Four reports mentioned procedural guidance regulating officials' decision-making in varied areas within the

two major departments concerned with the collection of revenue. This guidance regulated inter alia Customs Officers' relations with import agents[39], the by now infamous compounding procedure[40], and the Inland Revenue's procedure for preventing tax evasion by building sub-contractors (the so-called "lump" system)[41]. Equally the disposal of surplus government land was a fruitful administrative duty so far as the existence of procedural guidance was concerned. The reports referred to distinct sets of guidance on this topic regulating officials working within the Ministry of Defence[42], the Scottish Office[43], the D.H.S.S.[44], and the Property Services Agency[45].

Approximately the same proportion of procedural guidance was published as occurred with policy guidance (one third). However, it might be argued that citizens had a less weighty claim to the openness of this class of guidance, because it merely established the way in which the decision was reached rather than the basis of the decision. But such a distinction must be treated with caution as there may be good reasons why the procedure of decision-making should also be accorded publicity. For example, if it is assumed that a piece of procedural guidance reflects one department's view of the best administrative process for implementing a particular programme then a citizen may face a great burden in discovering if his case has been determined by that process when the guidance is not published. Furthermore, it is only when he has that information that he can adequately evaluate his options in responding to the decision. Consequently, in the absence of such publicity the citizen is in a weak position vis-a-vis the department, and he may refuse to accept the legitimacy of the

decision even when it has been reached in accordance with the guidance; so the department are faced with a disillusioned citizen and the latter has been subjected to unnecessary pressures. In this situation we should also note the status given to the procedural element of decisions by administrative law, most clearly via the rules of natural justice, as an indication of the importance assigned to the method by which administrators reach decisions. Therefore, there are also strong reasons to be concerned about the level of publicity given to procedural guidance.

Interpretative Guidance

Eight reports contained references to this final class of guidance. The greatest number of these pieces of guidance (six) elaborated the promulgating department's view of the meaning to be given to statutory provisions. Departments issued guidance on a broad spectrum of legislation extending from the Purchase Tax Act 1963[46] to the Countryside Act 1968[47]. The remaining two sets of guidance interpreted an extra-statutory tax concession[48] and a statutory licence condition[49].

Of the above guidance six sets were published. The media of publication were Public Notices issued by the Customs and Excise, booklets (detailing the scope of grants under the Industrial Development Act 1966 and rights under the Land Compensation Act 1973), and circulars (defining the ambit of wireless licences and the classifying of public rights of way under the Countryside Act 1968). Only the Home Office's interpretation of Parole Eligibility Dates, provided for by the Criminal Justice Act 1967[50], and the Inland Revenue's

definition of entitlement to the concession regarding miners' coal were not published. The high degree of openness attaching to most of the interpretative guidance discovered during the survey, which was particularly visible when compared with the other classes of guidance, was probably a consequence of the nature of this type of guidance. Departments seem to believe that their implementation of programmes requires them to publish their interpretations of ambiguous or controversial statutory provisions (e.g. the Customs & Excise issued their guidance on the tax liability of light fittings after uncertainty amongst manufacturers[51], whilst the D. o E. promulgated their circular on rights of way after litigation in the High Court[52]). Perhaps one explanation for this belief is that, as we shall soon discover, there is broad agreement amongst the grievance handling agencies that the courts have a primary role in interpreting legislation and therefore the departments feel the need to persuade the public to accept their own interpretations, which of course necessitates publication. Whereas in regard to the creation of policy and procedural guidance the departments consider that they have supremacy in these areas and therefore feel less obliged to publish these provisions.

The Parliamentary Commissioner for Administration's Responses to Administrative Guidance

General Introduction

Before launching into our examination of the P.C.A.'s responses it is vitally important to begin with a very brief consideration of the background to, and nature of, this institution in the British constitutional context, because

without such an understanding the Commissioner's decisions and pronouncements regarding administrative guidance will be incomprehensible. The first Ombudsman was created in Sweden and according to Lundvik, "the Constitution of 1809 prescribed that the Ombudsman should supervise the application of laws and regulations by judges, government officials and other public servants and prosecute those who in their official capacity had committed offences or neglected to fulfil their duties."[53] For over one and a half centuries this concept remained within the Scandinavian countries. Then in the late Nineteen Fifties it filtered through to the common law world. Britain was still undergoing the trauma of adapting to the existence of a welfare state bureaucracy, which was embodied in the Crichel Down affair[54] and the subsequent Franks Report.[55] JUSTICE concluded that they should examine the feasibility of importing the idea of an ombudsman into the U.K.[56] In 1961 their recommendations were published in the Whyatt Report (named after the committee's director Sir JOhn Whyatt Q.C.).[57] Two fundamental themes can be detected in the report's proposals for a Parliamentary Commissioner. First, the objective of the office would be to investigate and make recommendations for the alleviation of "maladministration" affecting individual citizens. This goal differs from the Scandinavian precedent both in terms of the P.C.A.'s role vis-a-vis particular citizens and the administration and in the notion of maladministration, which was considered to exclude the P.C.A. from reconsidering the merits of administrative decisions while requiring him to evaluate the processes and conduct through which the decisions were reached. Secondly, in outlining the characteristics, and

jurisdiction, of the P.C.A. the report sought to transform a continental ombudsman into a British Parliamentary Commissioner who would operate within a constitutional framework of ministerial responsibility, traditional Parliamentary supervision of the administration and the redress of constituents' grievances by M.P.s.[58] Therefore, the Committee considered that the P.C.A. should have jurisdiction only over central government departments, with restricted access to departmental papers and subject to a Minister's veto of specific investigations; coupled with the limited power to make recommendations regarding the remedying of complaints, the absence of disciplinary powers over civil servants and the preservation of their anonymity; with complaints having to be referred to the P.C.A. by M.P.s.. However, despite the cautiousness of these proposals, the Government rejected the report contending that a Commissioner would undermine the hallowed doctrine of ministerial responsibility and add further delays to the administrative process.

Several years later, as a redemption of a manifesto pledge and fortified by the experience of New Zealand,[59] the second government of Harold Wilson introduced a Bill which became the Parliamentary Commissioner Act 1967. Undoubtedly this piece of legislation substantially bears the hallmark of the Whyatt Report, with s.5(1) limiting the P.C.A. to investigating "action taken in the exercise of administrative functions", whilst s.12(3) repeats the Commissioner's exclusion from reconsidering matters of merits in the following terms, "it is hereby declared that nothing in this Act authorises or requires the Commissioner

to question the merits of a decision taken without maladministration by a government department or other authority in the exercise of a discretion veted in that department or authority." But in part the Act was stronger than Whyatt's recommendations, e.g. the P.C.A. had access to all government papers except cabinet ones and Ministers could not veto an investigation by him. Consequently Gregory and Hutchesson have observed that, " ... the Office of Parliamentary Commissioner which emerged in 1967 had become something substantially different from what had been envisaged by most of its original proponents ...".[60]

Now that we have an awareness of the major stages in the evolution of this institution and a basic appreciation of its relationship with departments, an examination of the responses of the Commissioner to each class of guidance can begin.

Policy Guidance

The P.C.A.'s reaction towards the value judgments enshrined in this class of guidance was firmly established in his first significant investigation, which concerned the treatment of former British prisoners of the Nazis by the Foreign Office. During the Nineteen Fifties the West German government had negotiated bi-lateral treaties with most of the Allied powers to pay compensation to their nationals who had suffered from Nazi persecution. In 1964 such an agreement was signed between the German and British governments whereby the former paid £1 million to the latter for distribution, at their discretion, to British nationals having experienced this type of suffering.

The Foreign Office as recipients of this money decided to distribute it themselves and therefore devised a series of rules to guide this operation. According to Fry, the then Foreign Secretary R.A. Butler outlined these rules to selected backbenchers and subsequently they were commonly referred to as the Butler rules.[61] These provisions provided that if a national could establish that he had been incarcerated in a concentration camp he would automatically be registered as entitled to compensation, but otherwise he would have to prove that he had been detained in an "institution with comparable conditions". The Foreign Office, mistakenly, believed that all concentration camps contained similar regimes and therefore imposed a uniform requirement of harsh treatment for a former detainee to satisfy the second rule. When the rules were applied to twelve ex-servicemen who had been detained in the Sachsenhausen concentration complex they were refused compensation as the Foreign Office considered that their imprisonment in the Sonderlager and Zellenbau portions of Sachsenhausen did not meet the severity of the second rule's demands. After lengthy protests on their behalf Airey Neave M.P. passed the ex-servicemen's complaints to the newly created P.C.A. In his report Sir Edmund Compton found that the complainants had suffered "injustice as a consequence of maladministration" through the biased way in which the Foreign Office had applied the Butler rules to their circumstances. However, whilst noting the inequities of the rules he stated that, "the Foreign Office have represented to me, I think correctly, that as Parliamentary Commissioner I am not authorised to question the merits of the rule."[62] Sir

Edmund's conclusion on this matter is very significant as he was accepting an extensive interpretation of s.12(3) that not only prevented him from acting as an appellate body regarding the merits of individual decisions made by departments, but also disabled his office from reviewing the contents of policy guidance. The necessary implication was that in his eyes it was solely a matter for departments to determine the nature and composition of this class of guidance. Additionally his approach indicated that he was not an adherent of the strict judicial doctrine of the fettering of discretion as Sir Edmund did not believe that the mere existence of the Butler rules amounted to sufficient evidence for a finding of maladministration.

The survey of later cases has confirmed that Sir Edmund's successors have retained and re-affirmed the Sachsenhausen approach to policy guidance. For example when a complainant questioned the Ministry of Overseas Development's refusal to pay him an expatriates allowance towards his employment at the University of Malawi, the P.C.A. had the following to say about the department's guidance regulating their exercise of statutory power under the Overseas Development and Service Act 1965;

> I am precluded by the Parliamentary Commissioner Act from questioning the merits of a discretionary decision provided that it was taken without maladministration and my investigation of this complaint has therefore been directed primarily to establishing whther or not, in the complainant's case, those rules have been properly applied."[63]

Similarly when an individual criticised the Department of Trade's unwillingness to appoint him as an authorised company auditor,

under s.161(1)(b) of the Companies Act 1948, because he failed to satisfy their guidance regarding the experience required, the P.C.A. was equally deferential to these provisions noting that, "I do not think that it is for me to make an assessment of these criteria."[64]

During the formative years of the Commissioner, Marshall, amongst others, drew attention to several extensions of the P.C.A.'s competence encouraged upon him by his Select Committee.[65] Of direct relevance to us is the 1968 recommendation concerning "bad rule reviews". The Committee suggested, and the Commissioner agreed, that where a piece of guidance which amounted to a policy rule was applied correctly by officials but caused "hardship" to a particular complainant,

> " ... it would be proper for the Commissioner to enquire whether, given the effect of the rule in the case under his investigation, the Department had taken any action to review the rule. If found defective and revised, what action had been taken to remedy the harship sustained by the complainant? If not revised, whether there had been due consideration by the Department of the grounds for maintaining the rule? It would then be open to the Commissioner to find that the complainant had sustained injustice in consequence of maladministration if these enquiries showed that there had been deficiencies in the departmental process of reviewing the rule ..."[68]

In their attempts not to infringe s.12(3) the Committee's phraseology left a large degree of uncertainty as to the exact extent of the P.C.A.'s authority in bad rule cases. If the department refused to review its rule did that of itself amount to an act of maladministration, or could the P.C.A. only make such a finding where the department had agreed to review the rule and he found their review process to be defective?

Marshall seemed to favour the first view, but could not the department invoke s.12(3) and argue that only where their refusal demonstrated elements of maladministration was it permissible for the P.C.A. to condemn their decision? Harlow has analysed this expansion of the Commissioner's power in the following terms,

> "at the instigation of the Select Committee, our Parliamentary Commissioner for Administration has assumed a comparable power (similar to the New Zealand Ombudsman) to recommend changes in administrative policy or regulations, although he exercises his rights more cautiously."[67]

But this is not strictly accurate because the Select Committee clearly stated, " ... it is not for the Commissioner to rewrite the Government's administrative rules."[68] And their whole concept of "bad rule reviews" was designed to avoid that possibility.

In practice, whatever may be the answers to the above questions, the P.C.A. has not made much use of this extended competence. The survey did not disclose one case where he explicitly invoked this power. Probably the nearest he came to utilising it was in a case where he asked the D. o E. whether they considered there were grounds for modifying their guidance on the payment of costs to unsuccessful objectors at Public Local Inquiries. The department examined their guidance and the ~~the~~ P.C.A. reported, " ... they have decided, for reasons which I accept, that such a course of action would not be justified."[69] However Gregory has expressed the opinion that even if departments do undertake to review their policy guidance at the behest of the P.C.A.,

"none of this has greatly increased the likelihood of the Commissioner's finding maladministration, for only an extraordinarily inept department might be expected so to conduct its review of the rule that the Commissioner would find defects in the process subsequently described to him."[70]

The second limb of Sir Edmund's reaction to policy guidance, established in the Sachsenhausen case, concerned the judicial concept of the fettering of discretionary power by administrators creating rigid rules to govern the exercise of their powers (this will be elaborated upon in the next chapter). Our survey of reports indicated that subsequent Commissioners have followed Sir Edmund's lead and have not incorporated an analogous concept into their definitions of maladministration. Indeed it can be concluded that the Commissioners have been supporters of the use of policy guidance, because in several reports they have acknowledged various administrative virtues associated with decision-making regulated by this type of provision. In the report dealing with overseas allowances mentioned above the P.C.A. stated, "it is clear that, in drawing up any scheme of this nature, rules have to be designed to try and ensure that the fundamental objectives of the scheme are achieved."[71] So there we discover the P.C.A. appreciating the value of guidance in detailing the goals to be pursued through the exercise of a broad statutory discretion. Another related advantage of subjecting decision-making, particularly that which takes place on a large scale, to policy guidance is the promotion of consistency in the determination of citizens'

interactions with the administration. During one of the Commissioner's investigations into the S.E.D. Awards Branch he reported that, "the Department have adopted guidelines (which have, in themselves, no statutory force) to ensure that this discretion is exercised fairly between applicants..."[72]. And such a development was not a valid ground for complaining about the Department. Furthermore, the use of policy guidance to provide consistency of treatment goes beyond decision-making concerning the distribution of direct financial benefits and extends into other areas of governmental activity, such as licensing. The Department of Trade's power to authorise persons as company auditors has already been encountered. When the P.C.A. scrutinised the Department's actual exercise of this discretion he observed that, "to achieve consistency in the exercise of this statutory discretion and to ensure as far as possible that persons authorised to be appointed are fully capable of meeting the needs of present-day companies legislation, the Department have developed criteria for measuring applicant's knowledge and experience."[73] So the Commissioner has perceived the integral benefits of policy guidance as a mechanism for detailing departmental aims and guiding the making of individual decisions by officials. Both of these attributes were also present in another positive feature of policy guidance recognised by the P.C.A., its ability to aid financial budgeting by departments. Two Commissioners in our survey encountered the former Ministry of Transport's guidance regulating their power, provided by s.48 Town and Country Planning Act 1959, to purchase property in advance of road building needs. Sir Alan Marre commented, "I accept that it is reasonable for a department, where

there is no statutory requirement for acquisition of property, to

make general rules of this kind to control discretionary expenditure

of public funds in advance of programme needs."[74] Consequently in such contexts guidance can support the tasks of establishing and observing financial targets by allowing senior officials to determine the frequency and extent of departmental expenditure.

From the examples discussed above it is obvious that the different Commissioners have been consistent in their approval of the use of policy guidance by departments as a device for regulating decision-making. The distinct benefits of guidance mentioned in their reports can also be viewed as explanations for the creation and utilisation of guidance in our administrative system. However, these explanations should not be treated as exhaustive, because they are only the views of one institution on some of the features displayed by a single class of guidance.

Although the P.C.A. has not been willing to review the substance of policy guidance, neither have departments been given a free reign in their usage of these provisions as the various Commissioners have followed the alternative strategy of critically investigating the application of guidance to the facts of individual complaints' cases. The ensuing examination will consider how successful this strategy has been.

In two cases the P.C.A. questioned the D.H.S.S.'s original decision not to backdate increases in war pensions due to their guidance that, "the Secretary of State exercises his discretionary power and authorises payment from an earlier date only where there is substantial evidence that the claimant was prevented by physical or mental incapacity from acting earlier, or where the records contain evidence of misdirection or other material error on the part of the Department."[75] The first

complaint involved an ex-serviceman invalided out of the services after the Second World War on psychiatric grounds; during 1953 it was discovered that he was also suffering from deafness and he applied for a war pension in respect of that disability; he was subsequently examined by a Specialist who concluded that the weakness was caused by a cold. Later the Department's doctors suggested that the complainant be tested in hospital but he refused because of a fear that he might be dismissed from his job. Fifteen years afterwards the complainant applied for, and was granted, a war pension but the Department refused to backdate it. When the P.C.A. had completed his investigation he "... asked the Department, however, whether there might not have been a case for arranging further investigations in the case, the Department accepted that the medical advice they received in 1953 must be regarded as incomplete..."[76]. Consequently they agreed to backdate the award under head two of their guidance. In the second case the complainant had undergone an amputation of one leg in 1944. After the operation his stump was measured as six and one half inches, this figure was then used to calculate the amount of pension the complainant was entitled to. During 1964 the stump was re-measured and it turned out to be four and seven eighths inches long, which meant that he was entitled to a higher pension; this was granted, but again without backdating. The P.C.A. concluded his investigation into the Department's application of their guidance by noting, "however, as in some other cases in which I have reported, it seems to me that the way they have been applied to the complainant has caused him an injustice ... [because] ... I have ascertained that the original stump measurement in 1944 was incorrect..."[77]. Therefore he

asked the Department to reconsider the case under their guidance and to pay the complainant interest on the increased pension he should have received from 1944, which they agreed to do.

Similarly the P.C.A. has questioned the application of the Inland Revenue's guidance regulating their extra-statutory discretion to remit interest charges due on late payments of tax which he described thus,

> "... I know they are only prepared to forgo interest in rare and special circumstances. By this is meant errors on their part that would make interest charges altogether unconscionable, as might happen if the taxpayer had been led to pay tax later than the due date as a direct consequence of some wrong or misleading answer to a question as to what was the due date."[78]

He found that the complainant had received a tax demand and wishing to dispute part of it the taxpayer had telephoned the Inspector to ask whether a formal appeal was necessary, only to be told that it was not. When the complainant returned from abroad two months later he discovered a demand for the full amount plus interest; after being contacted by the complainant the Inspector agreed to reduce the liability but refused to waive the interest charge. In the light of the P.C.A.'s findings that the complainant had been misled over the appeal procedure requirements, the Department agreed that this case came within their guidance and remitted the interest charge.

Probably the most amazing policy guidance case discovered in the survey also centered upon the Inland Revenue. The complainant was a retired Church of Scotland Minister who had numerous diverse sources of income with the consequence that the Department continually failed to calculate his tax liability correctly. Eventually he employed a firm of solicitors who

settled his tax affairs with the Department. However, when he claimed the solicitors' costs from the Department they refused, arguing that his case did not fall within their guidance on the payment of such costs. The guidance stated that costs would only be paid where," [they] had arisen directly out of a serious error by the Department of the kind which no responsible person acting in good faith and with proper care could reasonably have made or of the kind which becomes more serious because persisted in."[79] Despite the complainant's protests the Minister of State at the Treasury confirmed the Department's refusal; however he informed the complainant that a complaint could be made to the P.C.A. alleging that the Department had exercised their discretion unreasonably. So, in spite of s.12(3) a government Minister was suggesting that the P.C.A. be used as a form of appellate body to review the reasonableness of the Minister's decision! In his findings the Commissioner determined that the Department had repeatedly made errors in their calculation of the complainant's fiscal liabilities,

> "... I have therefore had to consider whether this was of such a nature as to bring it within the categories defined in the Department's own working practice ... It seems to me that the mishandling which has characterised the Department's dealings with the complainant's affairs were such as to bring the case within the ambit of those where reimbursement of agent's costs is justified."[80]

As a result he recommended that the Department pay the complainant's solicitors fees, which they agreed to do. Consequently, in effect, the P.C.A. was ruling that the Minister's original application of the policy guidance was not reasonable. This both demonstrated the breadth of the nebulous concept of maladministration and is one of the few instances where

the Commissioner was willing to overule a decision personally approved by a Minister.

Another facet of this same strategy adopted by the P.C.A. has been his tactic of suggesting that departments reconsider their original application of their guidance to the complainant's case on the basis of the additional information discovered by his investigation. For example, in one case the D. o E. refused to exercise their power under s.161(1) of the Local Government Act 1972 to remove a proposed ex-gratia payment by a local authority from the jurisdiction of the District Auditor. The facts were that the authority's officers visited the complainant's flat and were so shocked by its dangerous structural condition that they recommended she leave immediately and offered her a council flat instead. Later they made a closing order on the premises and the remaining tenants were therefore entitled to compensation from the authority under the terms of the Land Compensation Act 1973. However, as the complainant had left the premises voluntarily she fell outside the provisions of the statute, and when the authority asked the Secretary of State to exercise his discretion to permit them to make an ex-gratia payment the Department refused on the grounds that,

> "it is therefore the practice to limit the use of the sanction generally to unlawful payments which have been made in good faith in ignorance of the strict letter of the law, and to ex-gratia payments where an authority has a clearly defined moral liability to make them."[81]

In this case the Department did not consider the authority was under a moral duty to the complainant. After conducting his investigation the P.C.A. reported that,

"I do not criticise the Department for having taken that

view. I can see that at the time it was a perfectly proper one from their standpoint. They took due account of all the information then available to them and I find no maladministration in the way they reached their decision not to sanction the proposed payment. It did, however, seem to me that if the Department had had the benefit of all the evidence revealed by my investigation, they might have formed a different view on the moral liability of the Council to make an ex-gratia payment ... I therefore put it to the Department that they might wish to reconsider their decision in the light of the further evidence disclosed by my investigation."[82]

This the Department did and they eventually sanctioned the payment. Hence we see the P.C.A. not questioning the merits of the policy guidance nor its original application by the Department, but instead the Commissioner successfully suggesting that his investigation has unearthed new information upon which they might wish to reconsider their earlier decision. Such a hint is one which the relevant department would be well advised to heed if their senior officers wish to avoid the likely risk of being called before the Select Committee on the P.C.A. to be closely questioned on the matter.

To dispel any possible misapprehension that the P.C.A. is always successful in challenging the application of policy guidance a case involving the 1971 White Paper on tax concessions should be mentioned. Because the P.A.Y.E. scheme is not sensitive to all income changes the Inland Revenue conduct a review of each taxpayer's earnings and allowances after the tax year is complete and notify the individual of any rebates or payments due. As a consequence the White Paper excluded assessments due under this annual review from its concessions, except in highly unusual circumstances. The complainant started a part-time job in August 1970 and immediately notified his tax office, but it was not until May 1971 that his P.A.Y.E. coding was adjusted; furthermore during the intervening time period his employer had erroneously repaid him a portion of his tax

deductions. Eventually the Department sorted out the complainant's fiscal affairs and demanded £102:50 for arrears. The complainant claimed that he came within the exceptional provisions of the White Paper but the Revenue disagreed. The Commissioner found that the Department took a very narrow view of the exceptional category and applied it only in those cases where, "... the Department have repeatedly failed to make proper use of information, or where, as a direct result of official error, the underpayment has built up over virtually the whole of two successive years."[83] Despite the Commissioner's belief that, "it seemed to me that there might well be grounds on which the Department could treat the underpayment for 1970-71 as exceptional under the terms of the White Paper ... on the view they are taking of the White Paper, they have decided that it does not qualify to be treated as such."[84] Therefore, no remedy was provided for the Department's mistakes and the Department implicitly rejected the P.C.A.'s interpretation of the relevant policy guidance.

To conclude our assessment of this strategy we can note that in the limited number of cases where the P.C.A. has felt the need to challenge a department's application of its policy guidance he has been overwhelmingly successful in obtaining a reversal of their original decision. It seems that his most effective tactic has been to question the factual basis upon which the guidance was applied rather than its interpretation, because the survey only disclosed one unsuccessful challenge and that demonstrates the Commissioner offering an alternative view upon the ambit of the 1971 White Paper. Perhaps it is no coincidence that five of the six challenges involved guidance governing departments' provision of remedies for their prior mistakes (e.g. backdating war pensions, providing tax concessions

and paying professional advisors' fees) as the P.C.A. is the recognised authority on determining what action is necessary to alleviate maladministration and therefore his pronouncements in this area would be likely to carry even greater weight with departments.

Another aspect of the P.C.A.'s response to policy guidance that deserves our attention is his attitude towards the publicity and general openness accorded to this category of guidance by departments. From the reports examined it appeared that the Commissioner considered that the decision whether good administrative practice required the contents of policy guidance to be published was a matter which fell primarily within the responsibility of departments. For example, in the case dealing with the Department of Trade's power to approve company auditors, which we have already encountered, the Commissioner discovered that the very precise guidance created by the Department had not been published, "... because the Department takes the view that publication could give applicants for authorisation the impression that the quantity of their experience was all that mattered, whereas in fact an applicant could still be rejected if the quality of his experience was not adequate, or accepted if his experience although limited as to time was qualitatively of a high order."[85] The Commissioner simply accepted this proposition at face value and did not consider whether the benefits of secrecy out-weighed those of publication, or whether the publication of the guidance with a caveat expressing the Department's emphasis upon quality of experience would have been administratively feasible.

However, where the department has taken the decision to publish the contents of its guidance the Commissioner may

express his opinion on the question whether the actual form of publication was adequate. This occurred in relation to the Department of Energy's non-statutory Electricity Discount Scheme,

which provided that recipients of social security benefits would be entitled to a 25% reduction in their electricity bills for the winter quarter of 1977. A leaflet was issued at Post Offices which stated that the reduction would be given in respect of meter readings taken between February and April. The complainant had his meter read in February but he was not given a discount on that bill; when he made enquiries about this refusal he was informed that the Scheme only applied to readings "due" between February - April and that his reading had been scheduled for January but delayed because of staff sickness. He complained about the Department's determination of his application. The Commissioner found no evidence of maladministration in the application of the Department's guidance; however, he criticised their failure to explain in the leaflet that the Scheme only encompassed pre-scheduled readings. So the P.C.A. was willing to provide an external evaluation of the efficacy of the Department's actions to publicise the contents of their policy guidance.

The P.C.A. has also articulated his attitude towards the situation where a department does not disclose the content of policy guidance to an affected citizen and then subsequently applies those provisions to that individual. The then Ministry of Transport had developed guidance to regulate its power to appoint and remove designated vehicle testers and one part of this guidance provided that the Ministry would not allow applications from garages which were under the control of a person who had been convicted of a criminal offence within the

last two years.[86] The complainant owned a garage which had

been approved for testing, he was then sent to prison for having committed an unrelated offence. Three months later the Ministry revoked the garage's authorisation on the ground that there was no one capable of undertaking the testing. The complainant's wife wrote to the Area Mechanical Engineer asking if the garage could re-apply for approval if a new tester was employed. The Engineer replied that the garage would be entitled to re-apply in those circumstances, but he did not disclose the Ministry's guidance regarding garages controlled by recently convicted persons. Later the wife employed another tester and re-applied; however, following the Ministry's guidance the Engineer refused her application. The P.C.A. concluded that there had been no maladministration by the Ministry when they applied their guidance to the wife's re-application, but the Engineer's failure to take into account his non-disclosure of that guidance to the wife amounted to maladministration. The implication is that the P.C.A. may determine that maladministration has occurred where a person seeks advice from a department and the department fails to disclose material policy guidance, which they then invoke against that person at a later date. It can only be speculated whether the P.C.A. took this strong approach in the above case because it contained elements of forfeiture of a benefit as opposed to a mere initial application for some privilege.

From the reports discussed above it can be concluded that overall the P.C.A. has not been particularly vociferous in advocating greater openness for policy guidance. One reason for his reticence may have been the events of the Compton Bassett affair.[87] Briefly these were that the P.C.A. investigated a farmer's complaint that he had been denied the opportunity to

repurchase land acquired during the Second World War from his father. The complainant claimed that under the Crichel Down rules, governing the disposal of surplus government land, the Ministry of Defence was obliged to offer the land to him. The P.C.A.'s investigation discovered that the Government had secretly changed this set of guidance in 1966 and that under the new guidance the complainant was not entitled to be given first refusal on the disposal[88]. Furthermore, following his Sachsenhausen approach the P.C.A. did not question the merits of these changes, but confined his enquiries to determining if the new guidance had been properly applied. The Commissioner found no maladministration in the Ministry's implementation of the revised guidance. Subsequently the Select Committee on the P.C.A. considered this matter and discovered that the decisions to amend the Crichel Down rules and not to publish the revised guidance had been taken at Cabinet level. Therefore, the Committee were not able to pursue their enquiries further as the issue was perceived to be a matter of political judgement rather than administrative propriety.[89] Consequently we may surmise that the P.C.A. learnt that controversial pieces of policy guidance may not only be created at the highest political levels of the government but that these decision-makers may also determine the nature and extent of openness for these provisions. He appears to have concluded that it is for other institutions (Parliament?) to challenge such "political" decisions. Whilst it is quite understandable that the P.C.A. wishes to give a wide berth to subjects which may become the focus of party political controversy, such fears can be exaggerated as it seems highly unlikely that the Cabinet is directly involved in the promulgation of the majority of pieces

of policy guidance. On that basis it is an open question whether the P.C.A. should feel freer to speak out on the administrative implications of departments' unwillingness to publish this class of guidance, now that his office has the accumulated experience and prestige of nearly two decades behind it. The answer probably depends upon the particular commentator's conception of the ideal role of the P.C.A., a topic which raises issues that will be considered in the conclusion of this chapter.

The final facet of the P.C.A.'s response to policy guidance that will be examined concerns the rare reports where he makes references to the legal nature and implications of these provisions. In one of the earliest reports studied the P.C.A. was faced with a complaint regarding the administration of Betterment Levy.[90] During 1965 the Government published a White Paper presenting their proposals for a levy to be imposed on the development value raised by the sale of land. In order to prevent the levy being avoided by artificially arranged sales preceding the introduction of the levy, the White Paper stated that the ultimate legislation would contain a price formula for land transactions (details of which were contained in the White Paper) occurring between the date of the Paper and the entering into effect of the legislation. The complainants both bought and sold single plots of land for their own habitation during the above period and were subject to Betterment Levy on the formula prices, not the actual contractual prices. They wrote to the Minister asking him to calculate the levy on their actual gains, but he refused. Subsequently the Land Commission recommended that special treatment be given to such transactions and the Minister agreed to the proposal by means of an extra-statutory

concession. The complainants then complained about the Minister's original decision regarding their requests. When the Commissioner reported he stated,

"but I am not called on to express a view on the administrative soundness of dealing with problems relating to the interim period by a succession of special concessions, or on the propriety of giving effect to such concessions extra-statutorily in advance of amending legislation. My concern is with the position of the aggrieved persons whose cases have been referred to me ..."[91]

Therefore, as the concession provided a speedier relief for the complainants' levy liabilities than the passage of legislation, he did not criticise the Minister's use of guidance for this task. Thus the report disclosed the P.C.A.'s awareness of the important questions concerning the constitutional and administrative desirability of departments utilising extra-statutory concessions as a mechanism for ad hoc statute law reform. But he avoided expressing an opinion on these matters. However, it is only fair to the P.C.A. to note that, as we shall discover in the next chapter, other grievance handling agencies have also displayed a reluctance to venture views on this significant administrative device.[92]

In a later report the P.C.A. was more forthright about his attitude towards the legality of guidance containing extra-statutory concessions. There the guidance provided for the remission of interest payments due on late payments of tax in "rare and special circumstances". The Commissioner observed, "in my Annual Report for 1977 I accepted that in adopting this attitude the Inland Revenue were acting within the law and with the approval of Parliament since they were carrying out a policy which Treasury Ministers had explained to Parliament, and Parliament had agreed to it, in the course of the enactment of

the Finance (No.2) Bill (1975)."[93] If the Commissioner was suggesting that simply because Ministers had made statements to Parliament regarding the concession that of itself imbued the concession with some form of legal authority, he was expressing a view that runs counter to the prevailing constitutional orthodoxy on Executive power beginning with the Case of Proclamations[94]. It may have been that the Commissioner's opinion was influenced by a combination of factors, including his deference to Parliament and an absence of legal knowledge within his office. Today the latter omission has been rectified by the fact that the last two Commissioners have been experienced Q.C.s. Therefore, it could be argued that the Office is in a much stronger position to contribute to the resolution of the difficult dilemma over the administrative convenience of extra-statutory concessions as opposed to their constitutional propriety.

Procedural Guidance

The response of the P.C.A. to this class of guidance differs fundamentally from his reaction to policy guidance, the most noticeable difference being his greater willingness to question the substance of procedural guidance. In a number of reports discovered by the survey the Commissioner expressed sharp criticism of procedural guidance; therefore a cross section of his criticisms will be studied.

A circular issued by the former M.H.L.G. (73/65) provided that where a successful objector at a Public Local Inquiry had been represented by a professional other than a lawyer and the local authority disagreed over the level of the representative's fees, the dispute should be referred to the Ministry for

settlement. Established practice within the Ministry required the lump sum bill to be sent to the Ministry's legal department for "taxation". An objector complained about the Ministry's successors' handling of his representative's costs. The P.C.A. found that the D.o E. had recently changed their procedure so that disputed bills were sent to a High Court Master for taxing; but he criticised the old procedure for inter alia, not requiring itemised bills, and failing to allow the objector and the local authority to make representations to the Secretary of State about his proposed determination before it was finalised. He concluded, "for the reasons set out [above], I consider that the manner in which the Department made the original order for costs in this case did not reflect good administrative practice."[95]

In another report the P.C.A. encountered the D.E.S. guidance establishing the procedure for voluntary schools seeking building grants under s.68 of the Education Act 1944. A Board of Governors asked the Department to deviate from this procedure in their case but the officials refused, whereupon the Chairman complained to the P.C.A. arguing that the Department were not bound by the guidance as it did not have statutory force. The Commissioner agreed about the status of the guidance and said he would examine its "reasonableness". After his investigation the P.C.A. rejected the complaint noting, "... the Department have a duty to ensure that proper controls exist for the payment of grants which they are empowered to make. And as a result of my examination I am satisfied that the methods of control used by the Department are reasonable."[96] The Commissioner's undertaking to review the Department's procedural guidance was in stark contrast to his Sachsenhausen approach to

policy guidance. Presumably he felt that he had a more legitimate role in scrutinising this class of guidance as procedural matters provide the nucleus of the concept of maladministration.

Undoubtedly the Commissioner's most severe castigation of specific procedural guidance disclosed by the survey occurred in the Customs and Excise compounding case which we have already encountered earlier in this thesis. Where the Department have what they consider to be prima facie evidence of an offence committed by a person they may offer to compound criminal proceedings (i.e. not to prosecute the person before the criminal courts) in return for the payment of a financial penalty. Obviously this activity has profound implications for the proper functioning of the criminal justice system and personal liberty, therefore Customs Officers are subject to a regime of guidance regulating their use of the compounding process. In this particular instance a woman had shipped some furniture from Hong Kong to the U.K.. Her importers required a customs declaration to be filled in and she had completed it incorrectly through carelessness. A Customs Officer discovered her misstatement and she was interviewed by investigations officers. They concluded that she was guilty of the offence of "recklessly" completing a customs declaration contrary to s.167(1) Customs and Excise Management Act 1979. The officers offered to compound proceedings for a penalty payment of £280 and the woman agreed. Later she complained to the P.C.A. about the Department's treatment of her mistake. He reported,

> "my investigation shows that the Department's officers are making what are tantamount to legal judgments with insufficient understanding of the legal issues involved... I am therefore concerned to find that the instructions given

> to officers, who have to decide whether someone has been guilty of the offence of recklessness in completing a Customs declaration, are fragmentary and imprecise."[97]

The Commissioner went on to detail his criticisms of the substance of the guidance, including its ambiguous and outdated definitions of the mental state constituting recklessness[98], and the procedures to be observed by officers engaged in the compounding process. Regarding the latter he criticised their failure to include an explicit provision that suspects were to be given an opportunity to obtain legal advice before they had to decide whether to accept a compounding penalty, and the failure to provide for the passing up to more senior officers of difficult cases. In his own words,

> "... it seemed to me that, in equity, all alleged offenders should have the same consideration given to their cases when a sum for compounding proceedings is being decided and that all officials should be told that if in any case they feel that circumstances justify a lower sum for compounding than that laid down in the instructions, the case should be reported to a higher grade for decision."[99]

This case showed the P.C.A. not merely launching a withering attack on the substance of a department's procedural guidance but also making wideranging suggestions for its reform. It can hardly have been a coincidence that Sir Cecil Clothier was the Commissioner at that time, as no other case revealed by the survey contained such an explicit and perceptive understanding of the relevance of legal ideas (derived from the rules of Natural Justice and basic criminal procedure as outlined in the former Judges' Rules) to the shaping of the administrative process.

The P.C.A.'s critical approach to the substance of procedural guidance displayed in the above reports is to be

commended because his Office represents the external institution that possesses the greatest ability to scrutinise these provisions in their departmental settings. Through a combination of his statutory powers and the administrative experience of his staff the P.C.A. is in a unique position to determine if particular pieces of procedural guidance, encountered when investigating specific complaints, conform to an acceptable minimum standard of administrative procedure. The P.C.A. appears to have constructed such a standard from a blend of his jurisprudential ideas[100]. This response of the P.C.A. to an important class of administrative guidance must be seen as a significant contribution towards what Bradley has described as the Commissioner's establishment of a general social right to good administration.[101]

We must now consider the implications of the P.C.A. criticising the substance of procedural guidance. Did he then go on to find that the department responsible for promulgating the guidance had committed an act of maladministration? The answer was no, because out of five reports[102] containing such criticism only one included an explicit finding of maladministration.[103] The explanation is that the P.C.A. was concerned with the departments' overall treatment of the complainants, consequently their issuing and observance of defective procedural guidance was only one element in the Commissioner's assessment of the existence of maladministration. A positive factor such as a later procedurally correct review of the complainant's case by a Minister was sufficient to outweigh

the harm sustained through the subordinate officials' implementation of criticised guidance.[104]

A related issue concerns the amendment of procedural guidance criticised by the P.C.A. In three out of the above reports the departments had altered their guidance of their own volition,[105] and in the remaining two examples they agreed to amend these provisions in the light of the P.C.A.'s comments.[106] Whilst it is a compliment to the P.C.A.'s standing in the eyes of departments that they have been willing to review their guidance in these circumstances, he has no means of checking up on the effect of such undertakings. Therefore, taking into account the fact that only a minority of pieces of procedural guidance are published, the public cannot ascertain whether the departments are honouring their undertakings and if they are whether the actual amendments are merely superficial or substantial. Ideally the Select Committee on the P.C.A. is superbly placed to undertake this task as part of their responsibility for monitoring general defects in the administrative process brought to light by the P.C.A.'s investigations. Indeed they began in a very vigorous way by questioning the Principal Officer of the Foreign Office about the changes in departmental guidance introduced as a result of the Foreign Secretary's (George Brown) statements to Parliament following the P.C.A.'s report on the Sachsenhausen case.[107] The Committee's report provides plenty of fuel for suspicion regarding the redeeming of promises concerning guidance reform because they reported, "the Principal Officer of the Foreign Office was unable to give Your Committee any specific indication

either of the defects of the system that the Sachsenhausen case had brought to light or of the action being taken to mend the system."[108] Yet in the face of such administrative intransigence (or maybe because of it) the Select Committee sadly retreated from a rigorous scrutiny of departmental undertakings, with the result that in the following twelve years Gregory found only two other examples of the Committee pursuing the P.C.A.'s criticism of procedural guidance.[109]

We can now invert our perspective on the P.C.A.'s response towards procedural guidance and ask the question, how does he react to situations where officials reach decisions in breach of their guidance? From the survey it appeared that the P.C.A. was undergoing a conversion in his attitude. An example of his traditional response was contained in a report dealing with the Inland Revenue. Under the Income Tax (Sub-Contractors in the Construction Industry) Regulations 1975, introduced to deal with the problem of tax evasion in that industry known as "the lump", Inspectors were authorised to issue two types of tax exemption certificates, general and specific ones. The P.C.A. discovered that, " ... the Department's instructions tell Inspectors that if a company is issued with a [specific] certificate but strongly press for the issue of a [general] certificate the papers should be referred to Head Office where the decision will be reviewed."[110] (emphasis mine.) Despite this guidance when the complainants were issued with a specific certificate and protested, their case was not referred upwards and the company had to bring the dispute to the Head Office's notice via their trade association. Subsequently they complained to the P.C.A. and he concluded,

> "if Inspectors are given the power to exercise their discretion there will inevitably be cases where, in similar circumstances, their decisions will differ. This is one of the reasons why the departmental instructions allow for reference to Head Office if an Inspector's decision is strongly challenged ... I could only question such a discretionary decision if I found that there was evidence of maladministration in reaching it. I have found none...".[111] (emphasis mine.)

Apart from the obvious inconsistency between the Commissioner's accounts of the requirements of the Department's guidance, he was re-affirming his belief that breach of such provisions did not constitute maladministration.

Yet a few months later Sir Cecil was approving a decision by the Deputy Chairman of the Board of Inland Revenue to compensate a taxpayer for professional advisor's costs incurred after an Inspector had failed to observe an analogous piece of guidance. In that complaint the taxpayer had been subject to a demand for the payment of Capital Gains Tax on the proceeds of the sale of his main dwellinghouse. In rare cases such as this, "Departmental instructions provide that, where that section [s.103(3) Capital Gains Tax Act 1979] may be invoked, cases of doubt or difficulty should be referred to head office before arrangements to list an appeal for hearing by the Commissioners are made."[112] However, the particular Inspector failed to follow the guidance and the taxpayer was obliged to employ a

solicitor and counsel to present his appeal before the General Commissioners. He succeeded, but the General Commissioners had no power to order the payment of his costs. When he asked the Department directly for payment this was refused. Subsequently he had the matter referred to the P.C.A. In his findings the P.C.A. reported,

> "The Deputy Chairman went on however to express his concern about another aspect of the Inspector's handling of the matter ... Had that instruction been carried out in this case the Inspector would have been advised at a very much earlier stage that the matter should not be pursued ... He concluded that if the complainant would provide the Department with details of the unnecessary expenditure which he incurred after [the date the Inspector should have referred the case upwards] they would offer to reimburse him for this."[113]

Consequently the P.C.A. was acknowledging that breach of procedural guidance amounted to an administrative error which might necessitate compensation, when he concluded that the above offer was a "suitable outcome to a justified complaint". This conclusion is hard to reconcile with his view expressed in the previous case. Nevertheless in later reports the Commissioner has consolidated his shift away from his earlier response, so that he now appears to regard the failure to observe procedural guidance as an act of maladministration. This was clearly noticeable in the Customs compounding case where he stated, "I find that the offer made to the complainant was in accordance with the officer's instructions and there is therefore no question of maladministration in the form of failure to follow the administrative procedure laid down by the Department."[114] The Commissioner's conversion to the importance of officials observing their guidance could also be detected in his comments

in a report involving amendments to the Crichel Down code where he stressed, " ... clearly the Crichel Down rules must be observed in this as in other such cases involving the disposal of land acquired by the Government compulsorily or under threat of compulsion."[115]

Interpretative Guidance

The P.C.A.'s response to this class of guidance has been less controversial because of its respect for established constitutional and administrative practices. For example, the P.C.A. has accepted the legitimacy of departments creating and utilising these provisions to guide individual decision-making. He discovered that s.1 of the Industrial Development Act 1966 gave the Secretary of State a discretion to pay grants towards capital expenditure on "plant and machinery". The statute did not define these terms so the Department, in association with the Inland Revenue, developed their own interpretations which became very refined. When an application was received for a grant towards the costs of constructing cold rooms, the Department interpreted "plant and machinery" as only encompassing insulation which could be removed and transported elsewhere. The complainant's company was refused its application on the basis of this interpretation. The P.C.A. concluded,

> In applying this doctrine of separability the Department have made fine distinctions between one type of insulation and another ... my enquiries in this case ... have satisfied me that it has been necessary for the Department, in exercising their discretion under the Industrial Development Act, to define precisely the types of machinery and plant qualifying for grant, particularly on the borderline between plant and buildings. And I have not found grounds which would justify

me in criticising them for doing so.[116]

Hence the P.C.A. was acknowledging the Department's need to define an ambiguous statutory phrase in order to be able to effect its duty of processing 150,000 applications per year. Davis believes that this administrative requirement is universal as, "no government in the world can or does operate without administration, and an inescapable part of administration is to give meaning to the law that the administrators are carrying out...".[117]

Secondly, the P.C.A. has expressly restated the constitutional orthodoxy that it is the function of the courts to provide the ultimate interpretation of statutory language. A person complained that he had been refused a grant for drainage work by his local authority, because of an interpretation of the Housing Act 1969 promulgated by the D.o E.. The P.C.A. did not criticise the Department's interpretation but noted,

> "... this question of ownership in relation to grants remains a difficult point of interpretation of the law. Only the courts can give a definitive ruling following a particular case, and no such case has yet come before them."[118]

Although the P.C.A. has basically assigned the responsibility for reviewing the substance of interpretative guidance to the judiciary, the survey revealed that in an extreme case he was still willing to criticise the content of this form of guidance. A prisoner complained that the Home Office were misinterpreting the combined effects of s.49 Prisons Act 1952 and s.60 Criminal Justice Act 1967. Section 49 provided that where a prisoner was unlawfully at large during any periodof his detention that time was to be ignored in calculating the residue of his sentence, whilst s.60 authorised the Home Secretary to release prisoners on licence (parole) where he thought fit and they had served at

least one third of their sentences. The P.C.A. discovered that Home Office interpretative guidance stated that where prisoners

had escaped and were subsequently re-captured, their Parole Eligibility Dates (P.E.D.s) should be calculated by adding their sentence to the time that they were unlawfully at large and dividing by three. He concluded,

> "It seems to me however that this method was a misinterpretation of s.49 of the Prison Act 1952, and in particular of the provision there that no account should be taken of any time during which the prisoner was absent from the prison ... I suggested to the Department that in computing the P.E.D. the proper method of calculation to comply with the provisions of the Act, was to take one third of only the number of days in a sentence, making allowances for any overlap but taking no account of time at large; and then to defer the date thus arrived at by the time spent at large.[119]

In the light of the above findings the Home Office agreed to amend their guidance to accord with the Commissioner's interpretation and to review the P.E.D.s of all the prisoners coming within the ambit of this guidance. So we learn that if the Commissioner considers a piece of interpretative guidance to contain a flagrant misinterpretation, he will recommend what he believes to be the correct one and not wait for the matter to run the gauntlet of judicial review.

The P.C.A. has concentrated his main energy on scrutinising the development and application of interpretative guidance. Regarding the former activity, one of the earliest reports disclosed by the survey indicated that the Commissioner considered that the test for the presence of maladministration in the development of this class of guidance was the thoroughness of the department's efforts in formulating the provisions. The case involved the Customs and Excise's guidance stating that ceiling tiles were liable to Purchase Tax, under Schedule One Purchase Tax Act 1963. Before promulgating this guidance the Department had consulted the relevant trade

association and members of the general business community. Despite the complainant's protests they were subjected to the tax on their tiles as a consequence of the above interpretation. Four years later another company successfully challenged the Department's view in the High Court. They then complained to the P.C.A. about being governed by the discredited guidance for that time. He rejected their protests saying,

> "The test of maladministration is whether proper consideration was given before the decision was made. As a result of my investigation I am satisfied that the decision to impose a tax charge on the panels was not taken lightly and that the administrative processes leading to it were appropriate and adequate."[120]

This approach was again confirmed in the more recent case centering on the Inland Revenue's interpretation of their extra-statutory concession over ex-miners' free coal. The Department interpreted the term "miner" in the concession according to a definition agreed with the N.C.B.; and the P.C.A. found no maladministration in the creation or application of this piece of guidance.[121]

One apparent weakness in the P.C.A.'s scrutiny of the formulation of interpretative guidance was his deference to the opinions of departmental lawyers. This was vividly demonstrated in an early case relating to the Post Office's changing interpretations of radio licence conditions. Under the Wireless Telegraphy Act 1949 the Postmaster General was given the power to grant radio licences subject to conditions regulating their use; he issued a licence for any number of radios used by resident members of the licencee's household. According to departmental lawyers these conditions did not cover children of licencees away at boarding school; however, a generous interpretation of Housemasters' households was allowed. In 1967

the lawyers changed their views and informed the Minister that a strict interpretation of Housemasters' households should be observed forthwith. This new piece of guidance was published as an administrative memorandum, with the consequence that a large public controversy arose. Subsequently the departmental lawyers were presented with legal arguments that boarding school children were legally resident in their parents' homes and therefore covered by radio licences obtained by their parents. As a result the Minister had to alter his Department's guidance yet again! A boarding school Bursar complained to the P.C.A. about, inter alia, the Post Office's alleged incompetence in promulgating erroneous interpretations. But the P.C.A. dismissed this complaint with the simple comment that, "the issue of circular number 9/67 in April 1967 was a fully considered step, and rested on what was thought to be a firm legal basis."[122] He thereby avoided any assessment of the foundations for the lawyers' changing advice, or their steps in formulating it. One explanation for the P.C.A.'s cautious response may have been the absence of legal expertise within his office. Stacey has noted, "another unique feature of the Parliamentary Commissioner's office is that he does not have any lawyers on his staff."[123] However the appointment of Sir Cecil Clothier in 1979 seems to have ushered in a new era as he was more willing to use his own legal knowledge to challenge departmental lawyers' interpretations (e.g. in the compounding case) and where necessary to obtain Counsel's opinion on contentious legal questions.[124]

The final aspect of the P.C.A.'s response to this form of guidance involves those circumstances where an official misapplies his interpretative guidance. In another case dealing with the Purchase Tax Act 1963 the Commissioner reported that

the Department had issued guidance stating that "hard soap and soap substitutes" would be treated as falling outside of the "toilet preparations" liable to the tax under Group 32 Schedule 1 of the Act. An individual proposed manufacturing a hand cleaning pad, but before starting this venture he asked his local Customs office for a ruling on whether his product would come within the above exemption. After referring his question to their London headquarters they replied that his pad would be covered by the exemption. On the strength of this answer the individual invested £30,000 in production of the pad; however, later that year two competitors who were liable to Purchase Tax on their similar products protested to the Department. After having all three products analysed by a chemist the Department concluded that the individual's pads did not come within the concession. Subsequently he went into voluntary liquidation, and complained to the Commissioner. He reported,

> "I do not dispute the complainant's claim that he would not have gone ahead with the manufacture or marketing of the product if he had been given the correct information from the outset and would thus have avoided the position whereby his investment has failed. I therefore asked the Department whether they were prepared to consider some financial compensation for the unavoidable, identifiable losses which the company has suffered as a result."[125]

The Department thereupon agreed to pay the complainant £6,000 as an ex-gratia compensatory payment. Thus the Commissioner appears willing to hold that the erroneous application of interpretative guidance is an act of maladministration, which in appropriate circumstances justifies the making of financial recompense.

Conclusion

As the institution of the P.C.A. has matured there

has been a gradual increase in the debate amongst commentators about the form and strategic priorities of the office. Craig has reduced these alternatives into three distinct conceptions of the desirable role of the P.C.A..[126] First the traditional Whyatt image of the Commissioner having, "... as his main task the remedying of individual grievances caused by neglect, bias, or inattention within the administration."[127] Secondly, the view ascribed to Bradley, that the Commissioner should evolve into a form of "small claims administrative court".[128] And finally, Harlow's suggestion that the P.C.A. must assign priority to drawing, "... attention to lessons which should be learned from individual cases in order to improve administrative practice generally."[129] If we seek to consider which of the above conceptions the reports examined in this chapter favour, difficulties are immediately encountered due to the nature of administrative guidance. As has been noted before a basic feature of guidance is its generality of coverage, hence the guidance applies to everyone coming within its ambit. Consequently when the P.C.A. makes any comments on the content or application of a particular piece of guidance they are likely to have an effect extending beyond the specific case under investigation and therefore possibly be interpreted as demonstrating the P.C.A.'s preference for the third conception of his role.

In fact it is impossible to conclude that the responses detailed in this chapter provide evidence that the P.C.A. gives absolute priority to one of these roles. For example, it could be argued that his responses to policy guidance support the traditional idea of his office, because he has been primarily interested in reviewing the application of this class of

guidance to individual complaints' cases and his Sachsenhausen approach prevented him from evaluating the substance of this guidance. Furthermore the Commissioner indicated his unwillingness to express a view on the question whether it was generally desirable for departments to publish their policy guidance by leaving the issue to the discretion of the administrators. But the previous trends are counterbalanced through the Commissioner's scrutiny of the process by which interpretative guidance is created, and the content of procedural guidance. This indicates an interest in administrative practices and standards which are of collective importance to all citizens and not just to the individual complainant; a stance closer to Harlow's image than Whyatt's.

Therefore from the perspective of this dissertation, our conclusions will be more positive if they focus upon the P.C.A.'s underlying attitudes towards the various classes of guidance. His most vigorous response has been directed at **procedural** guidance where he has not only reviewed officials' observance of it, but has criticised the procedures established by several pieces of guidance and suggested amendments to them. Clearly the Commissioner believed that this was the class of guidance which he knew most about; consequently he did not defer final judgment on the wisdom of procedural guidance to the departments. However, both the P.C.A. and his Select Committee acknowledged that the Executive (in practice Ministers and their senior Civil Servants) had primary responsibility for the formulation of **policy** guidance, subject only to the accepted conventions of political accountability. In regard to **interpretative** guidance the P.C.A. recognised the established authority of the courts in the interpretation of legislation and

submitted to their definitive rulings on the validity of these pieces of guidance.

Now we can turn our attention to the judicial reactions towards administrative guidance and discover if they complement or conflict with the Commissioner's responses. Thereafter we shall be in a more enlightened position to determine if Craig's fear, that the second conceptual model of the Commissioner's role is likely to produce overlapping and antagonistic jurisprudences,[130] represents a realistic scenario for the legal treatment of administrative guidance.

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4. Detailed in Schedule 2 of the 1967 Act.
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16. 4/36/77 H.C.524 (1977-78) p.38.

17. 15/589/77 H.C.246 (1977-78) p.236.

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42. C.384/81 H.C.132 (1981-82) p.6.

43. C.483/80 Ibid. p.96.

44. C.1/81 H.C.327 (1981-82) p.36.

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50. C.264/G H.C.290 (1972-73) p.119.

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CHAPTER SIX

THE COURTS

Introduction

In this chapter we shall be considering the extent and nature of the judicial response to administrative guidance. At the outset we can note both the modernity and expanding scope of the relevant case law,with over twenty five significant cases displaying administrative guidance as an important element in the factual and legal basis of the decision,of which fourteen were decided after 1980 and eight between 1970-1980. We shall be seeking to answer a number of inter-related questions raised in earlier chapters of this thesis regarding the legal status and consequences of administrative guidance. These include:- the range of circumstances in which departments can lawfully promulgate guidance;when they can act upon such provisions;when guidance becomes legally binding upon its promulgators;the circumstances in which citizens can challenge the legality of guidance either generally or in its specific application to them;and whether the judiciary react differently to guidance produced by various departments. Underlying our critical exposition of the case law will be the desire to ascertain the trends in judicial attitudes towards

guidance. How have they responded to the different categories of guidance distinguished by this thesis, and what legal doctrines have they applied or created to provide the foundations in law for these responses? Where have the judiciary drawn the balance between the interests of departments and citizens in allowing the former to create and apply guidance to individual decisions affecting specific citizens? Finally,does the case law reveal any significant omissions in the reactions of the judiciary to administrative guidance?

In the light of the definition of administrative guidance given earlier in this work[1] it is necesary to make a few comments on the scope of the ensuing case law. Firstly,cases primarily revolving around delegated legislation,eg.the Prison Rules 1964 made under the authority of the Prison Act 1952 and considered by the Court of Appeal in Becker v. Home Office[2],fall outside the ambit of our research. Similarly the developing body of statutory Codes of Practice,such as those governing police conduct made by the Home Secretary under s.67 of the Police and Criminal Evidence Act 1984 also exceed the limits of this work. For the same reason,that the provisions are imbued with a "statutory" status (though this will naturally vary acording to the terms of the empowering Act), guidance which has been accorded a special value in administrative decision-making by legislation is also excluded from our deliberations,eg. the guidance followed by the Board in R.v. Police Complaints Board,ex p. Madden[3] which they were obliged

"to have regard to" by s.3(8) Police Act 1976.

Turning now to the methodology adopted for the discovery of relevant case law (which was defined as including both cases where guidance was a central aspect of the factual and legal basis of the decision, together with those cases which developed legal doctrines and principles applicable to guidance eg. the refinement of the British Oxygen[4] approach to policy guidance enunciated in R. v. Secretary of State for the Environment,ex p. London Borough of Brent[5]) this task faced the difficulty,noted previously in this work,of the absence of a standard nomenclature for the provisions we have called administrative guidance. Therefore, it was not possible simply to look up the words "administrative guidance" in the indexes of the leading textbooks or the subject headings of the various indices to the law reports. Instead the process was undertaken by scrutinising the appropriate sections of the textbooks (eg.those dealing with the control of discretionary powers through the doctrines of the non-fettering principle or the prohibition against the delegation of powers)to find references to cases coming within the scope of our study. This source was supplemented by a consideration of the few existing articles touching upon guidance. The traditional methods of legal research outlined above were augmented by the use of the Lexis computer database in a later period of the research[6]. This system offered a unique opportunity to develop our own search patterns tailored to the

discovery of cases involving guidance and freed from the constraints,derived from the restricted scope of the subject matter portions,of the published indices to the law reports. Lexis revealed several important cases including R. v. Lamb[7], C.P.A.G. v. Chief Adjudication Officer[8], R. v. Secretary of State for the Home Department,ex p. Hickling[9] , R. v. Secretary of State for the Home Department,ex p. Anderson[10], and Williams v. Home Office (No.2)[11].

POLICY GUIDANCE

Before entering into our own examination of the case law we must consider the work of previous commentators so that our evaluation may be enlightened by their analyses. The pioneering piece in this field was Henry L. Molot's article published in 1972[12]. This began with the premise that,

"the exercise of discretion and the capacity for policy making often travel together. Lawyers do not always notice the relationship because the influence of the judicial process may have led them to believe the shibboleths of the courts that decisions of policy are for the legislature alone to enact."[13]

He contemplated the ways in which the Canadian and English courts had reacted to "tribunals" (a term which he used to include all public decision makers having the authority to exercise discretionary powers) creating and using policy rules. Molot separated the courts' reactions into (a) the scrutiny of the legality of the policy rules and (b) their application of the non-fettering principle to the particular tribunal's use of such rules. He concluded that the English courts had

been more tolerant of Ministers' utilization of policy rules than where they had been adopted by licensing tribunals or local authorities. Personally he advocated a greater acceptance of these rules by the courts because,

"...to encourage a tribunal to ignore its own past experiences and the knowledge it has been accumulating is far from efficient or in tune with the idea of administrative expertise."[14]

In a subsequent article D.J.Galligan[15] returned to contemplate the English judicial attitude towards the,

"...process of adopting or developing guides by generalising policies to give content to discretionary power,which is constant from one decision to another,[this] may be called "individuation" and the guides that result "principles of individuation"."[16]

After noting the growth of this tendency in many areas of governmental activity (but without considering in detail the reasons why this was occurring) and its benefits , he sought to consider more closely the jurisprudential ideas applied to these provisions. Galligan was particularly interested in the possibility that following the Court of Appeal's decision in Saqnata Investments v. Norwich Corporation[17] the judiciary might begin to require an objective factual basis for principles of individuation. Furthermore he devoted much space to examining the implications of the House of Lords' decision in the British Oxygen case in terms of its refinement of the non-fettering principle in relation to contemporary administrative practices. In his view the modification of the principle was,

"...commendable both for its realism and its conceptual attractiveness. It is realistic because it acknowledges

the inevitability of individuation in decision making,where policy choices are made in advance but modified and extended in the light of new circumstances. The principle is attractive because it avoids the conceptual difficulties of allowing policies but then stipulating that they must be just one factor to consider in each case."[18]

He concluded by expressing the hope that the judiciary would promote the involvement of affected persons in the creation of principles of individuation and their subsequent widespread publication.

Without seeking to minimise the valuable contributions that these commentators have made we cannot simply accept their analyses of policy guidance as the definitive contemporary statements on the subject. This is because since the times of the publication of these articles the courts have given further consideration to guidance, and in addition there are aspects of the judicial response which neither commentator discussed,eg. the circumstances in which departments may become legally bound by their own guidance. Therefore,we must now conduct our own examination of the case law testing both the consistency and desirability of the judicial pronouncements, together with the accuracy of the above commentators' views.

(1) Direct and Indirect Challenges to the Legality of Policy Guidance

The first theme in the case law that we shall examine is the way in which the judiciary have dealt with claims by individuals that particular pieces of guidance were unlawful (by which I mean arguments that

the guidance was contrary to statute or common law rules). These contentions have taken two legal forms,first a direct challenge to the particular piece of guidance and secondly an indirect challenge via the questioning of a decision reached as a consequence of the application of the relevant piece of guidance. For the purposes of clarity both kinds of challenges will be considered according to the type of illegality being asserted by the plaintiff.

(a) Error of Law

A recent decision which provides a highly significant indication of the most senior members of the judiciary's attitudes towards direct challenges to policy guidance on this ground is Gillick v. West Norfolk Area Health Authority[19]. In that case Mrs. Gillick sought a declaration that a circular issued by the D.H.S.S. to health authorities setting out central government policy on the provision of family planning services was unlawful. Mrs. Gillick based her claim of illegality on three grounds,the most significant of which was the violation of her parental rights over her children. In a split decision the majority (Lord Fraser's speech was supported by Lord Scarman and Lord Bridge agreed with both these speeches) rejected each of the plaintiff's grounds of alleged illegality. For our purposes the most interesting aspect of the case was the difference between the majority's willingness to embrace such direct challenges to guidance.[20] Both Lords Fraser and Scarman took a generous view of the

nature of the rights being asserted by the plaintiff and classified them as private law ones. As Lord Scarman noted,"Mrs. Gillick's action is essentially to protect what she alleges to be her rights as a parent under private law."[21] Therefore they were willing to hold that she fell outside Lord Diplock's exclusive rule established in O'Reilly v. Mackman[22]. But Lord Bridge disagreed,"if the claim is well founded,it must surely lie in the field of public rather than private law. Mrs. Gillick has no private right which she is in a position to assert against the D.H.S.S.."[23] Consequently Lord Bridge's approach would subject a latter-day Gillick to all the procedural hazards that Order 53 still entails (Michael Beloff Q.C. has observed that the judiciary are even now reluctant to grant discovery or order cross examination during this form of proceedings to the detriment of applicants[24]). However, underlying the different perceptions of their Lordships over the characteristics of public and private law rights[25] there appeared to be a more fundamental divergence of views as to the desirability of the courts reviewing the legality of policy guidance. Neither Lords Fraser or Scarman expressed any reservations about such an activity, but Lord Bridge did at length. He began by reaffirming,what hopefully should be clearly established by now in this thesis,that,"the issue by a department of government with administrative responsibility in a particular field of non-statutory guidance to subordinate authorities operating in the same field is a familiar feature of

modern administration."[26] In his opinion,"the question whether the advice tendered in such non-statutory guidance is good or bad,reasonable or unreasonable cannot,as a general rule,be subject to any form of judicial review,"[27] with the exception, following the Royal College of Nursing case[28] (which we shall consider in detail when we discuss interpretative guidance),

"...that if a government department,in a field of administration in which it exercises responsibility, promulgates in a public document,albeit non-statutory in form,advice which is erroneous in law, then the court,in proceedings in appropriate form commenced by an applicant or plaintiff who possesses the necessary locus standi,has jurisdiction to correct the error of law by an appropriate declaration. Such an extended jurisdiction is no doubt a salutary and indeed a necessary one in certain circumstances,as the Royal College of Nursing case itself well illustrates. But the occasions of a departmental non-statutory publication raising,as in that case,a clearly defined issue of law, unclouded by political,social or moral overtones, will be rare. In cases where any proposition of law implicit in a departmental advisory document is interwoven with questions of social and ethical controversy,the court should,in my opinion,exercise its jurisdiction with the utmost restraint,confine itself to deciding whether the proposition of law is erroneous and avoid either expressing ex cathedra opinions in areas of social and ethical controversy in which it has no claim to speak with authority or proffering answers to hypothetical questions of law which do not strictly arise for decision."[29]

So Lord Bridge was advocating the view that the courts should only allow direct challenges to policy guidance on the grounds of error of law. But what would fall within this chameleon concept was not explained by his Lordship. In addition the above extract again raises the spectre of Order 53 to deter prospective litigants in the form,this time,of the uncertainties attatching to the requirement of locus standi following the

differences between the speeches of Lords Wilberforce and Diplock in Inland Revenue Commissioners v. National Federation of Self-Employed[30]. The power that this requirement allows the judiciary to exercise over the outcome of challenges is graphically illustrated in our next case.

Section 2 Finance Act 1969 imposed a new excise duty on bookmakers and required them to pay it one year in advance. As a result of lobbying the Chancellor of the Exchequer announced,via a press release,an extra-statutory concession regarding the duty that payment would be accepted on a monthly basis. Two bookmakers challenged the legality of the concession contained in this piece of policy guidance in R. v. Commissioners of Customs and Excise,ex p.Cooke and Stevenson[31] on the ground that it was contrary to statute law. Lord Parker C.J. began his judgment by noting that,"...one approaches this case on the basis,and I confess for my part an alarming basis,that the word of the Minister is outweighing the law of the land."[32] However,he dismissed the application on the finding that the applicants did not have a sufficient interest in the matter to seek an order of mandamus. Whilst we could criticise his Lordship for failing to respond to a clear violation of the rule of law by the Chancellor,his response may be more explicable when we put it in the context of the general judicial ambiguity towards such tax concessions. As Williams observes," the U.K. judiciary has never directly faced the question of the validity of

concessions...They have,on a number of occasions,dealt with such practices in passing,and comments have ranged from condemnation to strongly favourable comment."[33] It may be that this judicial reluctance to criticise unequivocally extra-statutory concessions for illegality is motivated by their awareness of the fact that Parliament tolerates them.

The next direct challenge to policy guidance that we shall examine concerns the prison service. In 1974 the Home Office issued an internal circular setting out the nature,purposes and details of a new form of confinement for disruptive inmates called Special Control Units. Prisoners were detained in these units until they had completed two ninety day periods of good behavior. The applicant had been incarcerated in such a unit at Wakefield prison and when he was released on parole he sought a declaration that the circular creating them was unlawful[34]. His arguments were (a)the Home Secretary had no statutory power to create them, (b) their conditions violated the Bill of Rights 1688 by being a "cruel and uncommon" punishment, and (c)his detention in the unit violated the rules of natural justice. Tudor Evans J rejected each of these propositions holding that s.12(1) Prison Act 1952 gave the Home Secretary power to establish the Units. Furthermore when,"judged by the standards of the English prison system,I do not think that regime in the unit was cruel."[35] Finally,he considered that only a minimal standard of procedural protection was required by

natural justice in this context in that the Control Unit Committee were obliged,"..to consider the request to transfer the plaintiff to the unit fairly and in accordance with the prescribed criteria"[36] and they had done just that. Again it may be possible to explain this refusal to accept a direct challenge to policy guidance by reference to the wider context of the decision. As we saw in Chapter One the judiciary, until very recently and under pressure from the European Court and Commission of Human Rights,have been very reluctant to recognise prisoners as having justiciable rights and Williams may have suffered a similar fate.

The last case involves an indirect challenge to policy guidance on the grounds of illegality derived from common law standards of criminal justice. In R. v. Mason[37] the appellant was asking the Criminal Court of Appeal to grant him leave to appeal against a conviction for burglary on the ground that the jury panel at his trial had been subject to unlawful vetting by the police. The court noted that the Attorney-General's guidelines of 1974 distributed to chief constables purported to regulate this activity. Lawton LJ refused leave on the basis that the vetting had taken place before the trial and therefore could not amount to a "material irregularity in the course of the trial" as required by the Criminal Appeal Act 1968. Consequently,"...it is no part of our function to criticise either the contents of [the Guidelines] or the Attorney-General's statement entitled "Checks on

Potential Jurors",which he issued in October 1978."[38] So the court seemed to be implying that it was not a suitable forum for determining the legality or merits of this practice despite the fact that historically the common law has been the dominant force in shaping our adversarial process of criminal justice.

To summarise our findings so far,we can note that citizens have not been successful in challenging,either directly or indirectly,policy guidance on the grounds that its promulgators have misconstrued statutory or common law rights. Furthermore if Lord Bridge's approach in Gillick is followed by other judges,and we have seen how the earlier court in Cooke manipulated the procedural requirements of locus standi to defeat the applicants' substantive claim,then virtually all direct challenges will have to be brought via Order 53. Consequently citizens will have to surmount the hazards of, inter alia,time limits,locus standi,and evidential restrictions,which when aggregated will inevitably increase the odds against successful challenges.

(b) Absence of an Evidential Basis for Policy Guidance

As we have already noted above Galligan believed that the judiciary were willing to review the legality of policy guidance on the basis that it was not supported by objective evidence. In his own words,"...one must consider the recent tendency of the courts to penetrate areas of discretion by requiring that policies themselves be supported by evidence of a sufficiently objective kind to satisfy judicial

scrutiny."[39] His major authority for this proposition was the Sagnata case. There Norwich council had passed a policy decision not to allow amusement machines within the city as they believed these machines had undesirable social effects on children. Subsequently the respondent company sought a licence from the council under the Betting,Gaming and Lotteries Act 1963 to operate such machines in the city. After an oral hearing before the relevant committee the respondents were refused a licence,inter alia,because of the council's policy. The respondents appealed to the Quarter Sessions where the recorder allowed their appeal on the grounds that the committee had unlawfully fettered its discretion and he was not bound to follow the committee's policy as he had found no evidence to support it. The Court of Appeal were only indirectly concerned with the actions of the council as their task was to consider whether the recorder had exceeded his jurisdiction. Edmund Davies and Phillimore LJJ concluded that he had not erred in law in reaching his conclusions. However, Lord Denning MR dissented, stating that the recorder had misunderstood the non-fettering principle and in failing to apply the council's policy he had committed an error of law because,

"...seeing that Parliament has entrusted the discretion to the local authority,it must intend then that their views should carry great weight. They are elected by the people to to do all things proper to be done for the good administration of their city."[40]

It can be argued that the primary issue of dispute between Lord Denning and the majority was who should

make the policy regarding licences for amusement machines,with the former advocating the supremacy of the council whilst the latter supported ultimate judicial dominance. As Edmund Davies LJ stated,

"for my part,I cannot see how it is practicable in cases such as the present for an appeal to Quarter Sessions to be other than by way of a complete rehearing."[41]

Whilst Phillimore LJ considered,

"no doubt speaking broadly local decisions are best taken by local people,but if the local authority are to be free from any form of check,justice and fair dealing can suffer."[42]

Consequently the issue of the factual basis of the licensing policy was only a subordinate matter in the reasoning of the judges and probably not part of the ratio[43] of the case. This view is supported by subsequent academic comment and judicial consideration of the decision. The writer who comes closest to Galligan's interpretation of Sagnata is Craig who has written:"to insist on the type of factual "backup" which the majority appeared to demand in the Sagnata case appears excessive."[44] But even Craig is far from certain that the decision unequivocally supports the evidential basis requirement as his use of the term "appeared" indicates. Others have tended to perceive the decision as affirming variations of the non-fettering principle. For example Beatson and Matthews state,"the implication of the majority judgements in the Sagnata case is that policies should not carry any more weight than any other relevant factor in a given case."[45] Jowell in his review of Lord Denning's contribution to administrative law cites his Lordship's judgment in Sagnata (which was

the one most favourable to the evidential basis requirement) as an example of Denning's promotion of the non-fettering requirement:

"the "fettering" principle,eagerly adopted by Lord Denning in other cases,is close to his principle of "genuine consideration" and related to the fairness doctrine. Thus, a rigid policy against amusement arcades was held to be wrong in law (citing ~~Sagnata~~),...".[46]

The Sagnata case has also been subjected to subsequent judicial scrutiny and that too rejects the evidential basis thesis. In R. v. Rochdale MBC,ex p. Cromer Ring Mill Ltd.[47] the applicants sought a refund of their rates from the respondent council. After having received an interpretation of the legislation from their treasurer the council refused a refund. Thereupon the applicants' claimed,inter alia,that the council had unlawfully fettered its discretion to pay refunds by having regard to the treasurer's report. Forbes J dismissed this part of the applicants' argument holding,

"I think Sagnata seems to cover this case. I cannot find anything in the words of (the treasurer's report) which go as far as the Court of Appeal in Sagnata. It seems to me that what that case is saying,in essence,is that,if the local authority applies a fixed policy in such a way as to show that it left itself no discretion outside the fixed policy,then that is not a proper way to proceed."[48]

So here we see the judiciary treating Sagnata as authority for the non-fettering principle with no mention of an evidential basis requirement for policies.

In conclusion Galligan was probably wrong to treat Sagnata as establishing the firm foundations for a factual basis obligation resting upon the promulgators of policy guidance. And in the light of subsequent case

law and academic comment it seems that such a basis for challenging the legality of policy guidance does not in fact exist.

(c) The Fettering of Decision-Making by Policy Guidance

A third basis for challenging the legality of policy guidance is the claim that particular pieces of guidance have the effect of,or have in fact resulted in,the fettering of the exercise of discretionary powers. According to de Smith the principle of the non-fettering of discretionary powers means that,"a tribunal entrusted with a discretion must not,by the adoption of a fixed rule of policy,disable itself from exercising its discretion in individual cases."[49] In other words it is impermissible for public bodies to pre-determine their decisions in individual cases via preliminary policy making where the effects of the policies are to prevent a consideration of the merits of particular cases (Merchandise Transport Ltd. v. British Transport Commission[50]) and/or exclude the possibility of exceptions being made to the policies in the light of the merits of specific cases (A.G. ex rel. Tilley v.Wandsworth LBC[51]). Policy guidance obviously falls within the general scope of this prohibition because it is one (albeit highly significant) manifestation of the existence of policies in central departments. However,a detailed consideration of the case law on this topic is necessary in order to discover how the courts have modified the non-fettering principle in its application to the use of policy guidance by departments.

Craig has observed that,"the extent to which a public body is and ought to be able to adopt a general policy,and the weight it should be entitled to accord it,is one of the central questions within administrative law."[52] We can discern two major factors, apart from the degree of flexibility of the policy itself, which appear to be central to the courts' answer to this question. First, the nature and subject matter of the public body's discretionary power which is regulated by the relevant policy. This is demonstrated by the Tilley case where the applicant sought to question the legality of the Council's policy decision not to grant financial help (under the Children and Young Persons Act 1963) to families who were intentionally homeless. Determining the policy to be ultra vires Templeman LJ stated,

"...I am not myself persuaded that even a policy resolution hedged around with exceptions would be entirely free from attack. Dealing with children,the discretion and powers of any authority must depend entirely on the different circumstances of each child before them for consideration."[53]

Clearly he was unwilling to allow councils any degree of freedom to predetermine decisions affecting children by prior policy making. Because of the severity of this approach in the face of actual council practices (eg. in the field of education) his views may have to be subjected to a restrictive reading based on the factual context of the case; nevertheless they demonstrate how the judiciary's acceptance of individual decision-making governed by established policies is heavily influenced by the subject matter of the discretionary power.

Further support for the importance attatched to the subject matter and the characteristics of the particular discretionary power can be ascertained from the case of In re Findlay.[54] There several prisoners challenged the Home Secretary's new policy regarding the exercise of his statutory discretion to grant parole to certain categories of offenders. The applicants claimed, inter alia,that the policy was unlawful as it fettered the Secretary's discretion. Lord Scarman giving the opinion of the House rejected this suggestion,along with the applicants' other grounds,

"my Lords, I have no doubt that Tilley's case was correctly decided. And it may be,though I express no opinion on the point,that the statutory duty in that case admitted of no policy other than that every case must be considered individually. But the duty of the Secretary of State in this case is,as I have already shown,a very complex one. Indeed,the complexities are such that an approach based on a carefully formulated policy could be said to be called for. There is, as I understand the law,nothing to prevent such an approach,where it is appropriate."[55]

So where the power is considered a complex one (by this Lord Scarman appeared to mean one which involves the need to balance a number of potentially conflicting objectives-in that case deterrence,retribution and the maintaining of public confidence in the criminal justice system) the courts are more willing to tolerate the generation of guiding policies.

The second dominant factor that is present in the judiciary's calculus over the acceptability of policy guided individual decision-making is the type of body and form of administrative process being used to reach individual determinations. For example the courts have

tended to discourage licensing magistrates from exercising their administrative power to regulate the supply of alcohol in their localities by policies, in favour of individualised ad hoc decision-making. In R. v. Rotherham Licensing Justices, ex p.Chapman[56] the applicant successfully challenged a decision of the magistrates made in pursuance of their policy not to grant more than two "occasional licences" to one organisation within a twelve month period. Lord Hewart LCJ held,

"the rule itself,however,or the principle,if that word be preferred seems plainly designed to prevent the application of an unfettered judgment to the individual case...That seems to me to be an abdication of the duty of the justices impartially to consider upon the particular facts the merits of each individual application."[57]

He considered that licensing magistrates should eschew prior policy making. Perhaps this conclusion was subconsciously influenced by the desire to discourage the idea that members of the judiciary,at any level,engaged in public policy making.

There are even dicta that tribunals should not follow pre-ordained policies. In the Merchandise Transport case Devlin LJ expressed the view that,

"...the tribunal may not in my opinion make rules which prevent or excuse either itself or the licensing authorities from examining each case on its merits...I respectfully adopt what Jenkins LJ said on a similar point in R. v.Flint CC ex p.Barrett [1957] 1All ER 122 :" a tribunal must not pursue consistency at the expense of the merits of individual cases." "[58]

However,the more frequently accepted standard governing the use of policies by tribunals was enunciated in the case of R. v. Port of London Authority, ex p. Kynoch

Ltd.[59]. There the applicants disputed the legality of the respondents' refusal to grant them permission to construct a wharf because it was contrary to the Authority's policy. Bankes LJ distinguished between,

"...cases where a tribunal in the honest exercise of its discretion has adopted a policy,and,without refusing to hear an applicant,intimates to him what its policy is,and that after hearing him it will in accordance with its policy decide against him,unless there is something exceptional in his case. I think counsel for the applicants would admit that,if the policy has been adopted for reasons which the tribunal may legitimately entertain,no objection could be taken to such a course. On the other hand there are cases where a tribunal has passed a rule,or come to a determination,not to hear any application of a particular character by whomsoever made. There is a wide distinction to be drawn between these two classes."[60]

On the facts of that case the Authority's policy fell into the first category and consequently the ensuing decision had not been unlawfully fettered. More generally the Court of Appeal appeared to be much more tolerant of policy-guided decisions being made by tribunals (though they did not define the ambit of this term [60*]) than the above decision regarding licensing magistrates.

We may now consider how the courts have combined the three variables (the flexibility of particular policies;the nature and subject matter of the relevant discretionary power;and the type of body making the decision) to determine the extent to which central departments can utilise policy guidance to govern their processing of individual cases without violating the non-fettering principle.

In the wartime case of Simms Motor Units Ltd. v.

Minister of Labour[61], the Minister had made a Statutory Order (Essential Work Order 1942) which provided that if specified categories of workers were dismissed for misconduct they could appeal to local boards. If the boards found in the workers' favour the local National Service Officer, who was a member of the Minister's department, had a statutory discretion to order re-instatement. The Minister issued policy guidance to the Officers informing them that they should order re-instatement if the worker so desired. Here the respondent company had indirectly challenged the legality of this guidance by raising the successful defence, to a prosecution for failing to re-instate a worker, of the contention that the guidance unlawfully fettered the discretion of the National Service Officer. Lynskey J upheld this argument stating,

"in our view, the Minister cannot by instructions limit the duties or limit the discretion of his National Service Officer, but he must carry out his Orders, as distinct from his instructions, and, under these circumstances, in our view, the notice requiring re-instatement in this case was invalid, and the appeal will be dismissed."[62]

Consequently the combination of a rigid piece of guidance (viz. that successful appellants wishing to be re-instated should **always** have their desire fulfilled) and the, relatively unusual, fact that the statutory discretion to order re-instatement was not vested in the Minister, but in one of his named officials, meant that the policy guidance had unlawfully fettered the officer's discretion by unduly transgressing on his freedom of decision-making. It may be hypothesised that

the High Court took this strict line because the granting of the statutory discretion to the officer,rather than the Minister, was designed to provide a decision insulated from possible political influence and therefore the Minister's instruction was a clear breach of this insulation. Let us now consider the situation where guidance is given to ordinary departmental officials.

In ~~Schmidt~~ v. ~~Secretary of State for Home Affairs~~[63] the government's policy on scientology was at the heart of the action. During 1968 the government declared that in their opinion scientology was "socially harmful" and as a result,"foreign nationals already in the UK for study at a scientology establishment will **not** be granted extensions of stay to continue these studies...". Several Scientology students who had their applications for extensions refused as a consequence of this policy sought to challenge its legality,inter alia,on the ground that it represented a fettering of the Home Secretary's discretion. Lord Denning MR,whose judgment was affirmed by Widgery LJ,cited the above extract from Kynoch and said that this

> "...shows that a tribunal may,in the honest exercise of its discretion,adopt a policy,and announce it to those concerned,so long as it is ready to listen to reasons why,in an exceptional case,that policy should not be applied. If such be the case with a tribunal,it is certainly the case with the Home Secretary. ...He must,therefore,be able to lay down general policy and give guidance to his officers for their day to day tasks."[64]

Therefore,in his opinion,the Home Secretary had not unlawfully fettered his discretion. The tone of this

judgment is very conducive to departmental utilisation of policy guidance and contrasts starkly with that in Simms. Here it is made clear that Ministers can regulate the decision-making of their civil servants by policy guidance. Even where the policy is expressed in mandatory and inflexible terms it appears acceptable; indeed the ministerial policy in Schmidt's case contained no express exceptions. The only restriction on the use of policy guidance is that the decision-maker must be willing to make exceptions to the application of the guidance in appropriate cases. However,it must be acknowledged that the views of Lord Denning and Widgery LJ on the legality of this guidance were undoubtedly influenced by the nature of the Home Secretary's underlying statutory discretion. According to Lord Denning,

"the [Aliens Order 1953] thus gives to the Home Secretary ample power either to refuse admission to an alien or to grant him leave to enter for a limited period,or to refuse to extend his stay...I think the Minister can exercise his power for any purpose which he considers to be for the public good..."[65].

So again we see how the judiciary's determinations of the legality of policy guidance involve a balancing of the three factors outlined above. In contrast to the statutory context in Simms case, the Minister here personally possessed a wide statutory discretion which entitled him to promulgate policy guidance containing a fixed policy.

The most important case so far decided on the legality of departmental use of policy guidance built upon the decision in Schmidt without actually

recognising the role the latter case played in granting judicial recognition to this method of decision-making. In British Oxygen Co Ltd. v. Minister of Technology[66] the appellants, inter alia, directly challenged the lawfulness of the respondent's policy not to make discretionary investment grants under the Industrial Development Act 1966 in respect of items costing less than £25. Lord Reid,whose speech was concurred in by three other Lords,began by repeating Bankes LJ dicta from Kynoch and continued,

"I see nothing wrong with that. But the circumstances in which discretions are exercised vary enormously and that passage cannot be applied literally in every case. The general rule is that anyone who has to exercise a statutory discretion must not "shut his ears to the application" (to quote from Bankes LJ). I do not think that there is any great difference between a policy and a rule. There may be cases where an officer or authority ought to listen to a substantial argument reasonably presented urging a change of policy. What the authority must not do is to refuse to listen at all. But a Ministry or large authority may have had to deal already with a multitude of similar applications and then they will almost certainly have evolved a policy so precise that it could well be called a rule. There can be no objection to that provided the authority is always willing to listen to anyone with something new to say- of course I do not mean to say there need be an oral hearing."[67]

As the respondent had complied with this obligation in the processing of the appellants' application,the legal challenge was defeated. At a more general level Lord Reid's views are of great significance,as they represent a tailoring of the non-fettering principle to the realities of contemporary administrative processes as used by central departments[67*]. He was willing to allow departments to develop policy guidance containing precise rules and to use these provisions subsequently

for the regulation of the exercise of discretionary powers in individual cases. But how did he balance the individual citizens' desire that their case be determined on what they considered to be its merits with the department's organisational objectives of uniformity and certainty in the application of policy guidance? By implication he was willing to tolerate the pre-determination of individual cases via the formulation and application of policy guidance provided the department was open to persuasion,on new grounds,that its guidance should be changed. What his Lordship did not express was the extent of the obligation on departments to consider individual cases which on their face appeared to fall foul of the relevant guidance. Viscount Dilhorne,however,dealt with this point in obiter dicta within his own speech. In his opinion,

"it seems somewhat pointless and a waste of time that the [department] should have to consider applications which are bound as a result of its policy decision to fail. Representations could of course be made that the policy should be changed."[68]

But this approach is not so harsh as it might at first seem because Viscount Dilhorne appeared to suggest that departments utilising guidance were obliged to publish its contents :"it was both reasonable and right that the [department] should make known to those interested the policy that it was going to follow."[69] Consequently those individuals who were likely to be excluded by the terms of the relevant guidance were put on notice and could decide whether they wished to make representations that the policy be altered. Neither of

their Lordships amplified upon the scope of this procedural quid pro quo, that departments using policy guidance must consider proposed alterations to it from affected citizens,beyond Lord Reid's view that an oral hearing need not be provided by the department. We must therefore consider later judicial refinement of the obligation.

The judiciary had to contemplate the meaning of the duty to consider representations that established policies should be amended in the case of R. v.Secretary of State for the Environment,ex p.Brent LBC[70]. There the incoming Conservative Government had announced that it intended to reduce the level of local authority expenditure and in pursuance of that policy objective the Minister had discussed the issue with local authorities. The Minister had informed the authorities that he intended to seek a statutory power to reduce the rates support grant of high spending authorities. Subsequently Parliament granted him that power in ss.48-50 Local Government,Planning and Land Act 1980. Once he had obtained this power the Minister refused to consider representations from particular authorities that it should not be used with regard to them. Six London boroughs who had their grants reduced sought to have the cuts quashed on the ground,inter alia,that the Minister had unlawfully fettered his discretion. Ackner LJ concluded that the Minister had,

"...clearly decided to turn a deaf ear to any and all representations to change the policy formulated by him before he obtained his statutory power... In our

judgment the Secretary of State was obliged to be ready to listen to any objector who showed that he might have something new to say... We accept that to be entitled to be heard it was for the objector to show that he had,or might have,something new to say."[71]

As the Minister had failed to comply with this obligation his reduction of the authorities' grants was quashed. For our purposes the most interesting aspects of the judgment were the court's endorsement of the restricted scope,acknowledged by the applicants,of Lord Reid's duty upon decision-makers. These limitations included (a)the Minister's freedom to observe the declared policy, provided he remained open to persuasion to change his views; (b) that he was not bound to hear representations already made to him when he was formulating his policy;(c) and that taking account of the time already spent on past consultations,he could fix a reasonable period within which new representations must be made. In the context of decision-making governed by policy guidance these factors indicate that the wider the initial consultations departments engage in whilst formulating these provisions , the fewer the representations they need consider at the guidance application stage. This inverse formula has much to commend it both in terms of the promotion of public participation in the creation of guidance and in the encouragement of efficiency in the administrative process. Though whether the individual citizen who was not involved in such prior consultations and now has to surmount the hurdle of establishing that "he might have something new to say" before he can demand the right

that the department reconsider the application of their policy guidance to his case is going to be equally tolerant of this approach is another matter!

Finally,and very briefly,we can note indications that the Scottish courts are also willing to accept the legality of policy guidance governed decisions. In Magistrates of Kilmarnock v. Secretary of State for Scotland[72] the pursuers challenged the defender's policy of not approving the appointment of Chief Constables who had previously been serving in that force. The Secretary of State had not embodied that policy in statutory regulations as he could have done under the Police (Scotland) Act 1956,but instead applied it as an administrative policy. Lord Cameron upheld the Secretary's actions because,

"I do not see how it could be maintained that,if an administrative discretion is to be properly exercised in recurrent instances,it should be improper,far less illegal,for the authority exercising that discretion to have regard to considerations of a general character affecting that recurrent exercise,as well as particular circumstances affecting the particular instance of its exercise."[73]

This approach is very similar to the Schmidt decision and allows departments to use guidance without the fear of being accused of fettering their discretion[73*].

We can now reach some general conclusions on how the judiciary have tailored the non-fettering principle to central departments' decision-making governed by policy guidance. Provided that the discretion being exercised does not deal with a topic which the courts consider unsuitable for regulation by policies (eg.childrens' needs as in Tilley),and that discretion

is vested in the Minister not in a named official within his department (Simms),the judiciary have been willing to accept the legality of departments utilising guidance containing precise and mandatory rules to determine the exercise of discretionary powers in individual cases. Two major conditions have been imposed by the judiciary on the freedom of departments to use such guidance,first they must be willing to make exceptions to their policies where exceptional individual cases so demand (Schmidt). Secondly they must consider the views of affected citizens' who wish to suggest,on the basis of novel grounds,that the department should change its policies (British Oxygen); but following Brent, the citizen has to satisfy the burden of establishing that his representations are new ones. The above balance is realistic in its weighing of the administration's and citizens' legitimate interests. Departments are able to operate administrative systems which take account of the necessities of the bureaucratic form of organisation, whilst affected individuals are protected by being able to contend that their case should be treated as an exception to the prevailing rules or that those policy rules should be amended. However,that still leaves the courts with a vital role in reviewing the observance of this balance by departments. Because as Galligan astutely observed,

"...the risk is that the requirement of considering each case to determine whether an exception or modification should be made,may be reduced to a mere formality,in which the interested party himself plays no part."[74]

It is suggested that just as the judges scrutinised the defendant's contention that she had acted on national security grounds in Council of Civil Service Unions v. Minister for the Civil Service[75], so they should carefully examine departments' claims that they have complied with the above requirements. Finally,it is pertinent to note the judicial pronouncements that the corollary to departments basing their decision-making upon policies is the publication of their contents (Lord Denning in Schmidt and Viscount Dilhorne in British Oxygen). Again it can be argued that the courts should strictly enforce such an obligation, so that where a department seeks to defend a decision made on the basis of unpublished policy guidance the courts will strike it down as the product of a fettered discretion,because in those circumstances the affected individual can neither make effective representations that his is an exceptional case nor that the guidance should be changed.

(d) The Unlawful Delegation of Discretion by Policy Guidance

Where guidance unlawfully provides for the exercise of a discretionary power by a person other than the rightful donee it might,at first glance,be thought that such guidance falls within the ambit of the category we have termed procedural guidance (see the Prelude preceding Chapter Five) as it is specifying the form of the decision-making process. However, we shall be examining examples of this guidance within our analsis of policy guidance, because the case law indicates that

commonly such guidance does not merely determine who shall make the ultimate decision but also details the criteria which govern the making of that decision. Thus we may consider what factors have influenced the judiciary in their response to complaints based on this head of illegality.

In Jackson Stansfield and Sons v. Butterworth[76] the plaintiff was a builder who was suing for damages under a contract he had performed to repair the defendant's garage. The latter party contended that the contract was void as there was no valid licence in existence for the building work as required by Regulation 56A of the Defence (General) Regulations 1939. The court discovered that the Minister of Works had in fact delegated the power to grant licences to local authority officers subject to conditions laid down in unpublished circulars. In this particular instance the relevant officer had granted the plaintiff an oral licence. The majority of the court concluded that such an oral licence did not satisfy the requirements of the Regulations,which they believed demanded a written one. Furthermore,Scott LJ determined that the purported licence was also invalid due to its origins as the product of an unlawful delegation of power from the Minister to local authorities. He stated his reasoning thus,

"delegatus delegare non potest,but the intention to delegate power and discretion to the local authorities is clear. The method chosen was convenient and desirable,but the power so to legislate was,unfortunately,not there."[77]

Hence his decision indicates that if a minister seeks to pass on,by means of guidance, some of his statutory functions to a person outside of those whom he can lawfully delegate powers to any decision made as a consequence of that guidance may be declared void by the courts. Scott LJ even appeared willing to set aside private legal relationships between individuals where they were significantly influenced by the unlawful guidance;thereby reminding us of Megarry's observation that such provisions not only affect individual/state relationships but also those between individuals/individuals[78]. Perhaps Scott LJ's strict approach to the constitutional propriety of such decision-making,which he also demonstrated in Blackpool Corporation v. Locker[79], can be traced back to his chairmanship of the Committee on Ministers' Powers[80] with its inherent concern about the alleged emergence of administrative despotism (see Chapter One).

In H.Lavender and Son Ltd. v. Minister of Housing and Local Government[81] the applicants indirectly challenged the defendant's policy on this ground by questioning the validity of a decision made in pursuance of it. The Minister had the statutory duty of determining appeals against the refusal of planning permission for specific developments by planning authorities. Where the appeal related to mineral working in certain categories of fertile agricultural land his policy was to refuse the appeal "unless the Minister of Agriculture,Fisheries and Food is not opposed to such

working". Willis J upheld the applicants' contention, saying "that means,as I think,that the Minister has by his stated policy delegated to the Minister of Agriculture the effective decision on any appeal within the agricultural reservations where the latter objects to the working."[82] So Willis J was not willing in the case of Ministers of the Crown to adopt an approach analogous to the rule in the Interpretation Act 1978 whereby the powers of one Secretary of State may be exercised by any other Secretary of State.[83] Instead each Minister could only exercise those powers conferred on his own office.

Another case where the applicant indirectly challenged policy guidance on the basis that it provided for an unlawful delegation of power was R. v. Secretary of State for the Home Department ex p.Hickling[84]. Under rule 9(3) Prison Rules 1964 (SI 1964 No388) the Home Secretary had a statutory discretion to permit women prisoners to have their babies with them in prison. By a non statutory Circular Instruction issued in 1983 he provided that prison governors were to determine whether prisoners could have their babies with them in special prison units and that this power was subject to criteria laid out in the Instruction. The applicant had permission to keep her baby in such a unit with her withdrawn by a governor in accordance with the above guidance. She sought a declaration,inter alia,that the governor had unlawfully terminated her permission and that only the Home Secretary personally could reach such

a decision. Sir Edward Eveleigh giving judgment for the Court of Appeal rejected the applicant's arguments because,

"it is not correct to treat this case as one where the Secretary of State has delegated his authority to terminate permission to be in a mother and baby unit. He has himself laid down conditions which must be fulfilled if a mother is to remain in the unit. The conditions with which we are concerned in this case are so straightforward that it must be right to allow the governor to decide if they are not being kept."[85]

In other words he believed that where the junior official was in a better position to apply guidance,due to his factual knowledge of the particular case,compared with that of the promulgator of the guidance then to allow the junior official to make the ultimate decision would not per se amount to an unlawful delegation of power. On this basis,most delegations via guidance would be lawful because those officials at the interface of departmental/public contact, particularly where they involve oral exchanges (eg.Customs Officers),are likely to have a greater appreciation of the factual background of the individual case than their superiors who have not had direct contact with the relevant citizen. What is surprising about the judgment is that it did not expressly refute the applicant's claim that prison governors could not be treated in law as the alter ego of the Home Secretary, since in both constitutional and organisational terms they must fall within that category of civil servants who are so treated. Perhaps the court's omission can be explained by the extempore nature of its judgment.

We can conclude that except where a particular statute authorises the delegation of powers or a rule of law allows it (eg. the rule providing for the inter-changeability of Secretaries of State), the most significant factor affecting the legality of delegations is the relationship between the delegator and the delegate. From the above case law,it seems that where guidance purports to delegate power to a person outside the department of the delegator (whether he be a fellow Minister or local authority officer) the courts are far more likely to quash any decision made in pursuance of that guidance,than where the delegation is to a junior official within the department. This appears to be a manifestation of the exception to the non-delegation rule that,according to de Smith,

"the courts have recognised that the duties imposed on Ministers and the powers given to Ministers are normally exercised under the authority of the Ministers by responsible officials of the department. Public business could not be carried on if that were not the case."[86]

Such an approach is eminently sensible and realistic when judged by the practices of the Secretary for State for Scotland in delegating the routine processing of student grants to territorial officers as disclosed in Chapter Three. In such a context the policy guidance both authorises individual officers to act in the Secretary's name and informs them of the norms they must use to determine individual entitlements.

(2) Judicial Enforcement of Policy Guidance

There now seems to be an emerging body of case law that provides the conceptual basis for the courts to

require departments to observe the contents of their publicly promulgated policy guidance at the instigation of affected individuals.[87] The case which established the legal foundations of this requirement did not itself deal with central government,but as we shall see its ratio has subsequently been applied to departmental guidance. ~~Re Liverpool Taxi Owners' Association~~[88] concerned the statutory power of Liverpool council to licence taxi cabs. In August 1971 the chairman of the relevant sub-committee gave an official undertaking that no more taxi licences would be granted until legislation restricting the activities of mini-cabs in the city had been obtained from Parliament. Five months later,and without consulting the applicants,the council resiled from that policy undertaking and purported to approve an increase in taxi licences. The applicants sought orders from the court to oblige the council to observe its undertaking. Lord Denning MR invoked the public law doctrine of "fairness" to demand,

"so long as the performance of the undertaking is compatible with their public duty,they must honour it... At any rate they ought not to depart from it except after the most serious consideration and hearing what the other party has to say;and then only if they are satisfied that the overriding public interest requires it. The public interest may be better served by honouring their undertaking than by breaking it. This is just such a case."[89]

Apart from the situation where policy undertakings purported unlawfully to delegate statutory powers to another body his Lordship did not indicate where their performance would be contrary to law. However,it is implicit in the above extract that in the generality of

situations Lord Denning believed that fairness required public bodies to observe their declared policies. The public body is given the freedom to depart from such undertakings where exceptional factors so necessitate,provided they have given individuals,who have been relying on the undertaking,an opportunity to be heard. Presumably such representations should be allowed to encompass arguments that the policy ought not to be changed,or if such a change is necessary,that the new policy should not be applied to a particular individual. Roskill LJ also invoked fairness to determine the illegality of the council's actions:"it seems to me,therefore,that now to allow the council to resile from that undertaking without notice to and representations from the applicants is to condone unfairness in a case where the duty was to act fairly."[90] Sir Gordon Willmer agreed,that the council were legally obliged to observe their undertaking, without specifying the origins of this obligation or citing any case law

As a backdrop to the Liverpool Taxi case it is relevant to note Lord Denning's long campaign (in decisions such as Robertson v. Minister of Pensions[91], Wells v. M.H.L.G.[92],and Lever Finance Ltd. v. Westminster City Council[93]) to transfer the private law concept of estoppel[94] into the realm of public law. This has generally been resisted by his judicial colleagues (see Megaw LJ in Western Fish Products Ltd. v. Penwith District Council[95]) as inapplicable to the context of

public decision-making. But fairness,which is a public law concept[96],appears more acceptable to the judiciary even though it is capable of achieving the same results as Lord Denning sought to obtain in earlier cases via estoppel!

In the case of R. v. Secretary of State for the Home Department, ex p.Khan[97] the leading judgment of Parker LJ was substantially based upon Lord Denning's use of fairness in Liverpool Taxi and directly applied the reasoning in that case to departmental policy guidance. The applicant wished to obtain approval for the immigration of his brother's son whom he intended to adopt. He acted upon a piece of policy guidance in the form of a circular letter issued by the respondent which,inter alia,purportedly detailed the criteria governing the Secretary of State's discretion to admit such children. It later transpired that the Secretary had decided to refuse entry clearance for the child on the basis of other policy criteria. Consequently the applicant sought to challenge the decision on the grounds that the Secretary was bound by the criteria articulated in his guidance. Parker LJ upheld this contention:

"there can,however,be no doubt that the Secretary of State has a duty to exercise his common law discretion fairly. Furthermore,just as,in the Liverpool Taxi case,the corporation was held not to be entitled to resile from an undertaking and change its policy without giving a fair hearing so,in principle,the Secretary of State,if he undertakes to allow in persons if certain conditions are satisfied,should not in my view be entitled to resile from that undertaking without affording interested persons a hearing and then only if the overriding public interest demands it."[98]

Dunn LJ reached a similar conclusion,but applying the landmark case of Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation[99] he determined that the Secretary's guidance specified the "relevant" considerations regulating the discretion to admit children for adoption. In his opinion,

"the cases cited by Parker LJ show that the Home Secretary is under a duty to act fairly,and I agree that what happened in this case was not only unfair but unreasonable. Although the circular letter did not create an estoppel,the Home Secretary set out therein for the benefit of applicants the matters to be taken into consideration,and then reached his decision on a consideration which on his own showing was irrelevant. In so doing in my judgment he misdirected himself according to his own criteria and acted unreasonably."[100]

The dissentient,Watkins LJ,did not disagree with the principles of law applied by his colleagues,but he considered that the circular letter could not be read as specifying the criteria governing the Secretary's discretion.

The use of fairness by the court in Liverpool Taxi and the majority in Khan to require the promulgators of policy guidance to follow its terms in subsequent decision-making affecting individuals is to be welcomed. From the perspective of citizens it enables them to plan their lives with a greater degree of certainty regarding the likely response of central departments to their chosen courses of action. This state of affairs,it can be noted,is a fundamental requirement of contemporary expositions of the "rule of Law" (eg.the writings of Lon L Fuller[101] and the jurisprudence of the European Court of Human Rights[102]). Furthermore the departmental

obligation to observe guidance ensures that particular individuals are not arbitarily discriminated against by departments,or their officials,failing to correctly implement their guidance.[102*] However,the formula adopted by Lord Denning and Parker LJ expressly recognises the legitimate interests of departments in being able to alter their policy guidance where the public good (presumably as determined by the political value judgments of the minister)so demands. Consequently the fear which underpinned the judicial reluctance to countenance the transferring of estoppel to the public law realm,namely that of disabling public decision-makers from being capable of responding to altered circumstances,does not arise under this formulation of the requirements of fairness. Neither are those individuals who have been relying on the earlier guidance totally sacrificed to the needs of the new policy era,because the department is obliged to consider representations that their cases should still be determined according to the former guidance. This obligation placed on departments has echoes of the duty to consider representations required by British Oxygen. There is also a degree of symmetry about that decision and Khan in that the former demonstrated clear judicial acceptance of the organisational need for policy guidance and the cost in terms of the reduction in weight given to the merits of individual cases,whilst the latter enables individuals to seek judicial enforcement of those same pieces of policy guidance

where the department is refusing to observe them. Consequently both the promulgators and subjects of guidance are in principle bound by its terms.

(3) Judicially Required Public Participation in the Formulation of Policy Guidance

There is no direct case law dealing with the important issue of whether policy guidance,or at least the application of such provisions,can be challenged on the ground that the public generally or a section thereof were not consulted prior to the promulgation of the guidance. By analogy Craig has suggested that Bates v. Lord Hailsham[103] is persuasive authority as to how the courts would respond to such a challenge.[104] There a group of solicitors challenged the making of a piece of delegated legislation establishing a new basis for calculating professional fees on the ground that the defendant had violated a common law duty to consult all solicitors. Megarry J dismissed their claim,

"let me accept that in the sphere of the so-called quasi-judicial the rules of Natural Justice run,and that in the administrative or executive field there is a general duty of fairness. Nevertheless these considerations do not seem to me to affect the process of legislation,whether primary or delegated. Many of those affected by delegated legislation,and affected very substantially,are never consulted in the process of enacting that legislation;and yet they have no remedy."[105]

However,it may be that despite some factual similarities to the scenario posed above this case is not so relevant to policy guidance because of the different constitutional context in which guidance is created compared to that of delegated legislation. Megarry J could well have been influenced in his judgment by the

desire to prevent the courts from trespassing on the sacred territory of parliamentary sovereignty,by requiring additional procedures for the enactment of statutory norms in cases where Parliament had not so decreed. But such a consideration is inapplicable to guidance as it is not statutory in character and Parliament has no involvement in its creation. Therefore,we may obtain a more realistic indication of likely judicial responses from the case law on guidance itself.

Some of the cases analysed previously contain dicta that have a bearing on whether fairness could be invoked to underpin a requirement for public participation in the formulation of policy guidance. Lord Denning's judgment in Liverpool Taxi (see above) could be read as requiring a public body,which has announced a policy,to hear representations on why the policy should not be altered from individuals or groups who have been relying upon it. Such a duty would not arise when the body first developed a policy but only when it engaged in revisions of that policy. This judgment may not in practice establish a sufficiently firm foundation for a general duty to consult because of the limited scope of the policy at issue in that case,namely one primarily affecting only taxi cab and mini cab operators. Where a policy affects a far wider range of groups in society (which much policy guidance will because of its national coverage) the courts may well be less willing to impose extensive consultation requirements on departments.

Also the judgment of Ackner LJ in Brent L.B.C. could be interpreted as providing an incentive for departments to consult interested persons before promulgating policy guidance which they intend to utilise to govern discretionary decision-making. He held that,

"the Secretary of State is under no obligation to listen again to representations made to him when he was in the process of formulating that policy,hence the reference to "new representations"."[106]

Consequently the more extensive the initial consultations the less onerous need be the duty to hear representations against the content of policy guidance at the application stage.

Craig is a strong advocate of the imposition of consultation obligations upon departments engaged in guidance creation;"consultation is of such importance in this area precisely because we feel that validation through the standard political mechanism of the House may be unworkable,inappropriate,or both."[107] Furthermore he believes consultation offers the advantages of "instrumental" benefits (ie.the production of higher quality guidance through the infusion of the ideas of more groups and individuals), together with "developmental" rewards (ie.personal self improvement) for those who participate in the process of consultation.[108] Whatever the many advantages of increasing the involvement of the public in the creation of policy guidance there appears little evidence that the judiciary are willing to generate a general duty to consult. We should not be too critical of this failure

when it is juxtaposed with the similar omission on the part of the far more interventionist American Federal judiciary noted in Chapter Four and also in Stewart's major evaluation of the role of contemporary U.S. administrative law.[109]

Interpretative Guidance

There does not appear to be any detailed consideration of this form of guidance in the British academic literature,therefore our examination of the case law will have to create its own framework of analysis. We shall consider those issues revealed by the cases to be the dominant factors in determining the trends in judicial responses to this category of guidance. However,as we will soon discover the questions faced by the judiciary in their deliberations regarding the legal significance of interpretative guidance are not identical to those encountered in their consideration of policy guidance. These differences can be explained by the unique characteristics of the distinct categories of guidance which inevitably affect the legal status of particular types of guidance.

(1) Judicial Supremacy in the Interpretation of Statutory Language

Undoubtedly the pivotal fact underlying the judicial response to both indirect and direct challenges to the legality of interpretative guidance has been the judiciary's declared constitutional role as the ultimate and supreme interpreters of statutory language (whether it be found in primary or delegated legislation). As

Lord Reid said in Padfield v. Minister of Agriculture,Fisheries and Food[110],"...the policy and objects of the Act must be determined by construing the Act as a whole,and construction is always a matter of law for the court."[111] Scarman LJ repeated this sentiment in the context of interpretative guidance during his judgment in H.T.V. v. Price Commission[112],

"...the interpretation of legislative language remains a question of law. It is,therefore,a matter for the courts,unless their jurisdiction has been expressly excluded. And it takes very clear language to exclude the supervisory jurisdiction of the High Court..."[113].

Therefore it is not surprising to learn that the dominant form of challenge to the legality of interpretative guidance is the contention that the department have misinterpreted the legislative will and consequently the court should substitute its interpretation for that contained in the guidance.

In R. v. Greater Birmingham Appeal Tribunal, ex p.Simper[114] the applicant indirectly challenged an interpretative rule of the Supplementary Benefits Commission which had been applied by the respondent tribunal. The rule provided an interpretation of Schedule 2 of the Ministry of Social Security Act 1966 to require the automatic deduction of any exceptional circumstances benefit awarded from the amount of a long term supplement a claimant might become entitled to. The applicant argued that Schedule 2 merely gave the Commission a discretion to ensure that there was no overlapping benefits being paid. Cusack J agreed with the applicant's interpretation and quashed the

tribunal's decision applying the Commission's guidance.

Indirect challenges can also be brought in relation to guidance which purports to interpret delegated legislation as the Scottish case of M'Lean v. Paterson[115] demonstrated. The Scottish Milk Marketing Scheme had the legal status of delegated legislation made under the Agricultural Marketing Act 1931. If a milk producer was not registered with the Scottish Milk Marketing Board or exempt under s.13 of the Scheme as a small producer,and he sold milk he committed a criminal offence. The Board issued a circular defining small producers as those who did not sell milk to more than six neighbours in one day. The appellant,who was not a registered producer,sold milk to twenty neighbours on one particular day and he was convicted for so doing. He appealed on the ground that the Board's guidance was erroneous in law. Lord Wark rejected the Board's claim that the guidance was merely an interpretation of the Scheme,

"...it is,I think,evident that it is ultra vires,at least so far as the limitation of the term "neighbours" to six persons is concerned. Such a limitation appears to me to be not an interpretation but an alteration of the term and of the section. Moreover,I think that the question of the interpretation of the section is one for the Court in the last resort."[116]

Instead he concluded that the guidance was not an exhaustive definition of small producers,but an indication of the Board's view of who fell into that category which could be supplemented in appropriate cases by including other specific producers. Therefore,the appellant's conviction solely on the basis

of the guidance should be quashed. Whilst his Lordship's strict attitude towards the Board's guidance may have been motivated by the consideration that it was in practice defining the ambit of criminal liability,the case does illustrate how even guidance interpreting delegated legislation can be brought within the scope of judicial scrutiny.

Recently we have seen the House of Lords countenance a direct challenge to interpretative guidance in the Royal College of Nursing case (which has already been referred to obliquely in our discussion of policy guidance). There the College sought a declaration that guidance issued by the D.H.S.S. stating that it was lawful under the Abortion Act 1967 for nurses to carry out abortions via the induction procedure when acting under the general direction of a qualified doctor was wrong in law. Whilst their Lordships disagreed over the correctness of the guidance (a majority of 3 to 2 considered it to be correct),not one of them questioned the propriety of the action. However,in the Divisional Court Woolf J considered that the College had locus standi because it provided insurance for its members (which would presumably be affected by the range of duties they performed) and that nurses generally had an interest in the guidance because they were employed by bodies subject to supervision by the department (who would therefore be likely to follow the guidance?). Even though O'Reilley had yet to be decided Woolf J expressed the view that,"...in my view,it would have

been much better if in this type of case proceedings were brought by way of judicial review under RSC Ord 53,when[sic]the court has the same power to grant a declaration."[117] He believed Ord 53 had the advantages of (a) requiring leave to apply to be obtained (obviously this is of benefit to the department not the prospective challenger of guidance), (b) speed in obtaining a determination of the legality of the guidance,and (c)more generous locus standi requirements.

The views of Woolf J were taken up by Lord Bridge in his speech in the Gillick case (see above). His Lordship was the only member of the House to devote much attention to the propriety of direct challenges to the legality of administrative guidance and, as we have already noted,he wished to restrict the involvement of the courts in reviewing these provisions. The whole tenor of his speech was to limit judicial consideration to "errors of law" (by which he appeared to mean misconstructions of statutory and common law rules) and avoid examining the reasonableness of guidance where it dealt with questions of "social and ethical" controversy. Consequently it may be hypothesised that if Lord Bridge's views are followed by the courts in the future the judiciary are likely to exercise their important discretions under Ord 53 to deter direct challenges to policy guidance,because the composition of these provisions is primarily constructed of the types of value judgments his Lordship wished to avoid having to review. In contrast they will be more amenable to

applications concerning interpretative guidance as their contents are far closer to the pure questions of law which his Lordship felt most secure in reviewing.

In practice the courts have already demonstrated a greater readiness to question the substance of interpretative guidance compared to their response to policy guidance. As we have seen they substituted their own interpretations of the "true" meanings of the legislation in Simper, M'Lean,and only failed to do so in Royal College by a majority of one. Whilst they refused to overturn any of the policy guidance questioned on the grounds of alleged error of law. We can only conclude that the judiciary's assumed role as the final arbiters on the meaning of statutory language has placed them in a position of dominance with regard to the content of interpretative guidance;whereas the inverse is true of policy guidance because there the judiciary have recognised that the donee of the discretionary power should have the predominant role in determining the way in which the power will be exercised (eg.Schmidt and British Oxygen).

(2) Judicial Support for Departmental Use of Interpretative Guidance

Although the cases discussed above indicate the ultimate supremacy of the judiciary in the interpretation of statutory language,the judges do not appear to be averse to departments utilising interpretative guidance,at least where the courts can rule on its accuracy. In J&J Colman Ltd. v.

Commissioners of Customs and Excise[118] the appellants had issued a "notice" informing importers of the department's interpretation of the phrase "goods from the Commonwealth preference area" found in s.2(2) Import Duties Act 1968. The Court of Appeal agreed with the respondents that this notice was too restrictive in its scope,but Lord Denning MR stated whilst,

"the Customs authorities cannot,by these notices,make the law or alter it. Their notices afford valuable guidance to commercial men,because they show what evidence will satisfy the Customs authorities. Parcels which conform to them will pass without question. But the notices are not conclusive. It is open to the owner to dispute the matter before a referee or the court under s.260 of the Customs and Excise Act,1952."[119]

He appeared therefore to be implying approval of interpretative guidance because of its potential value in enabling individuals to determine the attitudes of departments to questions of law and thereby plan their actions accordingly.

Woolf J also expressed support for guidance in the case of Crake v. Supplementary Benefits Commission[120], where the applicant challenged the respondents' interpretation of the controversial concept of "co-habitation" found in Schedule 1 Supplementary Benefits Act 1976. He was not himself willing to provide an authoritative definition of the concept; instead he concluded,

"...I should say that there is a supplementary benefits handbook which sets out guidance to claimants,and that,very conveniently has a paragraph (paragraph 21) dealing with the problem as to when couples should be treated as living together as husband and wife,and it sets out no doubt what the tribunal were referring to as the criteria. What they are,in fact,are admirable signposts to help a tribunal,or indeed the commission,to come to a decision whether in fact the parties should be

regarded as being within the words "living together as husband and wife" ... it appears to me that the approach indicated in the handbook cannot be faulted."[121]

The views of Woolf J are not only interesting because they demonstrate a member of the judiciary praising the content of departmental interpretative guidance (we can note how the guidance in this instance was a paradigm example of the fact that all guidance is not composed of precise rules,see Chapter One,but here contained five factors which could be considered according to the particulars of each case in order to help reach a conclusion whether the claimant was a co-habitee). Woolf J's dicta are also of significance because they indicate that he thought the use of interpretative guidance in departmental decision-making was helpful. Unfortunately he did not explain what this help consisted of,but it may well have been in the promotion of consistency in determining individual claimants' entitlements when one takes account of the background to this case (ie. public disquiet about the methods and criteria being used to reach decisions on the status of claimants by different local offices). These two cases reveal judicial encouragement for the utilisation of publicly promulgated interpretative guidance by departments. The judges appear to have considered the beneficial aspects of such a form of decision-making to be both internal (ie. to help improve the quality of officials' determinations) and external (ie.enabling individuals to comprehend the department's interpretation of statutory provisions).

(3) The Imbuing of Interpretative Guidance with Legal Effects

Going beyond mere support for departmental usage of guidance,there are dicta which suggest a willingness on the part of some members of the judiciary to infuse acceptable interpretative guidance (ie.those pieces which the courts consider do not demonstrate an error of law) with a degree of legal effect. As a consequence such guidance must be taken into account by the relevant decision-maker and a failure to do so may result in the quashing of any individual determination made without regard to the guidance. Two legal doctrines,which we have already encountered,have been used to achieve this requirement. First, the doctrine of relevant considerations as articulated in the Wednesbury case. Scarman LJ invoked this doctrine to oblige a local authority to pay heed to interpretative guidance issued by a department in Bristol District Council v. Clark[122]. The council purported to exercise its statutory powers under the Housing Act 1957 to evict the respondent from his council house for rent arrears. He claimed that the decision was ultra vires due to the council's failure to consider the purposes of their statutory powers as set out in the department's circulars. The learned Lord Justice held,

"I do not think it possible to rely on those circulars as imposing any direct statutory duty on a housing authority;but I think they are a good indication as to the purposes to be served by the Housing Acts and as to what are relevant matters within the language of Lord Greene MR in the Wednesbury case to be taken into account by a local authority serving a notice to quit on a council tenant in arrears of rent."[123]

However,he found that the council had in fact considered all relevant matters and so he decided in favour of the council. Scarman LJ's resort to the doctrine of relevant considerations is almost identical to the later judgment of Dunn LJ in Khan's case, where the latter demanded that the Home Office observe its policy guidance. One may,therefore,deduce that both Lords Justices placed a significant emphasis on decision-makers paying attention to relevant guidance (even if it was not produced by the actual decision-maker as in Clark) whether it be of the policy or interpretative variety.

The second doctrine which has been invoked is that of "fairness" and this has been deployed in the slightly different factual context of requiring the promulgator of interpretative guidance to continue applying that guidance in subsequent decision-making. In H.T.V. v.Price Commission[124] the applicants claimed that the Commission had unlawfully changed their interpretation of the phrase "total costs per unit of output" as found in the statutory Price Code (made under the Counter Inflation Act 1973). Up until 1975 the Commission had interpreted(the report does not elucidate whether this interpretation was formally promulgated, but it was certainly known by the companies)the Exchequer Levy charged to independent television companies as a cost, but then they decided that it should no longer be classified as such. Lord Denning MR considered that the Commission's statutory powers meant that they bore major responsibility for interpreting the Code,we should note

that generally departments do not possess a similar authority with regard to their legislative powers. He then extended the substantive effects of the fairness doctrine,which as we have seen he had first expounded in the Liverpool Taxi case,to demand of the Commisssion that,

"...if they regularly interpret the words of the Code in a particular way-they should continue to interpret it and apply it in the same way thereafter unless there is some good cause for departing from it. ...It cannot be estopped from doing its public duty. But that is subject to the qualification that it must not misuse its powers:and it is a misuse of power for it to act unfairly or unjustly towards a private citizen where there is no overriding public interest to warrant it."[125]

Consequently his Lordship determined that the Commission were bound by their earlier interpretation of the Code. Scarman LJ differed in his perception of the Commission's powers because he considered that it was for the courts to interpret the Code.

"However obscure the jargon,it is the language used or approved by Parliament,itself a representative non-technical body. If Parliment uses it,the courts must be prepared to give it meaning:and this in the ultimate is a legal,not a technical process."[126]

On that footing he reached an interpretation similar to the Commission's earlier view of the Code. However,as a secondary basis for his decision he stated,

"if therefore,the meaning of the term "total cost per unit of output" is for the Commission,not the courts,to determine,the Commission cannot now say the Exchequer Levy is not a cost included in the term without laying themselves open to the criticism that they are acting inconsistently in the same subject matter. But inconsistency is not necessarily unfair. Is this inconsistency unfair?"[127]

His answer was that it would be unfair because of,inter alia,the consequent erosion of the companies profit

margins. Goff LJ agreed with the applicants' contention on the grounds of both judicial interpretation and the requirements of fairness.

The above judgments indicate the willingness of the judiciary,in appropriate circumstances,to oblige public bodies to follow their own interpretations. The difference between them depends on how one calculates whether in a specific instance fairness requires the observance of a declared interpretation. Lord Denning would demand observance "unless there is good cause for departing from it" ; whilst Scarman LJ appeared to leave the question for individual ad hoc determination according to the circumstances of each instance. To the extent that Lord Denning's phraseology is slightly more favourable to consistency it may be given our support.

The House of Lords considered the H.T.V. case in their decision on R. v. Inland Revenue Commissioners,ex p.Preston[128] and proposed a third formulation of the test for when fairness necessitates consistency in official actions. Preston claimed that an inspector in the special investigations section of the Revenue had undertaken,on behalf of the department,not to continue an investigation into the taxpayer's affairs in consequence of the taxpayer agreeing to withdraw claims for certain tax allowances. Four years later another inspector sought to re-assess the taxpayer's liabilities for share dealings that had occurred in the earlier period. The taxpayer requested a declaration that the Revenue's conduct was unlawful due to its violation of

the requirements of fairness. Lord Templeman gave the opinion of the House (in which Lord Scarman concurred) holding that,

"...the H.T.V. case and the authorities there cited suggest that the commissioners are guilty of "unfairness" amounting to an abuse of power if by taking action under s.460[of the Income and Corporation Taxes Act 1970] their conduct would,in the case of an authority other than Crown authority,entitle the appellant to an injunction or damages based on breach of contract or estoppel by representation. In principle I see no reason why the appellant should not be entitled to judicial review of a decision taken by the commissioners if that decision is unfair to the appellant because the conduct of the commissioners is equivalent to a breach of contract or representation."[129]

But on the facts of this case he could not find such a representation made by an official of the Revenue,therefore the taxpayer's claim was dismissed.

From our standpoint what is fascinating about Lord Templeman's opinion is his reformulation of the criteria for determining when inconsistency between initial statements by a department and subsequent actions will be held to amount to illegal unfairness. He equated this calculation with the private law concepts of breach of contract and estoppel[130]. Whilst this may be a sensible attitude towards situations where there is a proximate relationship between the citizen and the department reflected in personal assurances given to the citizen,it may be less applicable to instances where the citizen is seeking to rely on impersonal representations contained in interpretative guidance. Furthermore,the onus is placed on the citizen to demonstrate that the department's conduct amounts to a hypothetical breach of contract or estoppel,whereas under Lord Denning's test

in H.T.V. once the citizen has established that the public body normally follows a particular interpretation it is up to that body to prove that it has "good cause" for departing from that interpretation. Taking these factors into account we can suggest that Lord Denning's test is the most appropriate one for determining when departments are legally required to follow their own interpretative guidance.

Procedural Guidance

The only commentator who has directly considered the legal significance in the U.K. of procedural guidance is Jergesen[131]. He concluded that,"in Britain judges operate on the edges of a system that is for the most part the responsibility of others..."[132]. The institutions that he believed played a more central role in enforcing procedural guidance were the P.C.A. (see Chapter Five for our study) and the Council on Tribunals[133]. The general judicial perception of such provisions was,in his opinion,that,

"the power of government agencies to run themselves is thought to be an inherent one,existing independently of statute. ...Internal procedures are normally published as departmental circulars or orders to subordinates,elucidating the steps to be taken by agency personnel in dealing with matters within their competence. Their violation is solely a matter for the internal discipline of the department."[134]

We shall now consider whether his conclusions regarding the limited cognisance which the judiciary have given to procedural guidance are an accurate reflection of the contemporary trends in the case law.

(1) Judicial Scrutiny of the Contents of Procedural Guidance

One area of administration where there has been an undoubted increase in the willingness of the judiciary to examine and where necessary condemn the substance of this type of guidance is that of prison management. Beginning with R. v. Hull Prison Board of Visitors,ex p. St. Germain[135] the courts started to reverse their earlier reluctance to become invoved in prisoners' grievances (eg. displayed in Arbon v. Anderson[136]). There eight prisoners challenged the legality of "awards" (ie.punishments) imposed on them by the Board arguing that the disciplinary procedure had violated the minimum standards required by natural justice and fairness. On the preliminary question of whether it had a supervisory jurisdiction over the Board the Court of Appeal concluded that it did. One factor which helped the court in reaching that conclusion was a piece of guidance issued to prisoners facing a hearing before a board of visitors. According to Megaw LJ,

"Form 1145 is not,as I understand it,a form which has statutory authority;but no doubt it has the approval of the Secretary of State. It sets out in simple language the procedure which the prisoner can expect to be followed when he appears before the board of visitors. ...This,to my mind points to a judicial proceedings."[137]

Consequently he determined that the Board was amenable to judicial review via the prerogative orders. In St.Germain (No2)[138] the Court of Appeal found that the Board's procedure had "substantially" infringed the requirements of fairness by preventing all the prisoners' attempts to cross examine the sources of

hearsay evidence admitted by the Board. Therefore,most of the Board's awards were quashed. To the extent that the Board were following the procedure detailed in the Home Secretary's guidance,the court's criticisms of their proceedings can also be regarded as an implied castigation of the contents of that guidance.

The House of Lords were faced with the intricacies of the prison administrative system in Raymond v. Honey[139]. The respondent prisoner had sent a letter to his solicitor containing an allegation against a prison official and in accordance with departmental instructions it had been stopped. Thereupon the respondent sent a letter to the courts seeking to have the appellant governor committed for contempt of court because of his interference with the respondent's legal communications. The governor then stopped the letter to the courts and this action for contempt arose out of that act of censorship. Before the House the governor argued that his actions were authorised by the Prison Rules (Rule 34(8) stated that prisoners were not allowed to communicate with any person in connection with legal business except with the leave of the Home Secretary) and by procedural guidance in the form of Standing Orders (Order 29 provided that prisoners were not allowed to bring court proceedings against officers until they had exhausted prior internal grievance procedures). Lord Wilberforce considered that there were two legal principles which applied in this situation.

"First,any act done which is calculated to obstruct or interfere with the due course of justice,or the lawful

process of the courts,is a contempt of court. ...Secondly,under English law,a convicted prisoner,in spite of his imprisonment,retains all civil rights which are not taken away expressly or by necessary implication."[140]

He then assessed the department's instructions to the governor in the light of these principles.

"In my opinion,there is nothing in the Prison Act 1952 that confers power to make regulations [sic] which would deny,or interfere with,the right of the respondent,as a prisoner,to have unimpeded access to a court. ...The regulations [sic] themselves must be interpreted accordingly otherwise they would be ultra vires... The standing orders,if they have any legislative force at all cannot confer any greater powers than the regulations..."[141].

Consequently he determined that the governor's actions per se were unlawful as they amounted to a contempt of court. Lord Bridge took a more critical view of the Prison Rules than Lord Wilberforce,because in the former's eyes,

"this rule-making power is manifestly insufficient for such a purpose and it follows that the rules,to the extent that they would fetter a prisoner's right of access to the courts,and in particular his right to institute proceedings in person,are ultra vires."[142]

So he was willing to find both the Governor's actions and the statutory rules purporting to authorise those acts unlawful.

Whilst this decision again reveals the emerging intervention of the judiciary on behalf of prisoners it also graphically illustrates a conflict between the judges as to the degree of probing they will undertake of the hierarchy of statutory and non-statutory norms regulating prisoners' rights. Consequently their Lordships' decision produced the absurd and unjust result that the governor was found to be acting in an

unlawful manner by correctly following procedural guidance,in the guise of Standing Orders,and none of their Lordships was willing to venture a word of criticism of that guidance!

In R. v. Secretary of State for the Home Department,ex p.Anderson[143] the High Court demonstrated that it had overcome the House of Lords' reluctance to question the legality of procedural guidance. The applicant,who was another prisoner,claimed that he had been unlawfully denied the right to consult a solicitor. The assistant governor of his prison had refused to let him be visited by a representative of his solicitor, because he had not initiated any internal grievance about the matter he wished to obtain legal advice on. According to Standing Order 5A(34) prisoners were only allowed such meetings where the prisoner had already ventilated such a grievance (this so called simultaneous ventilation rule had replaced the prior ventilation rule operating in Honey's case due to the European Comission of Human Right's decision in the case of Silver v. U.K.[144]). Robert Goff LJ,giving judgment for the court,applied Lord Wilberforce's principles in the following manner;

"it must,we consider,be inherent in the logic of the decision [in Honey] that an inmate's right of access to a solicitor for the purposes of obtaining advice and assistance with a view to instituting proceedings should be unimpeded,in the same way as his right to initiate proceedings by dispatching the necessary documents for that purpose by post is unimpeded. ...As it seems to us,a requirement that an inmate should make such a complaint as a prerequisite of his having access to his solicitor,however desirable it may be in the interests of good administration,goes beyond the regulation of the circumstances in which such access may take place,and

does indeed constitute an impediment to his right of access to the civil courts."[145]

Therefore,the court granted a declaration that,inter alia,Standing Order 5A(34) was ultra vires. This decision is to be commended for the manner in which the court faced up to the reality of the administrative system operating in the prison service and did not treat the assistant governor's action as an isolated event, but had regard to the legality of the procedural guidance which was the foundation of his conduct. As a result he was not personally subject to judicial censure for observing the guidance issued to him by his departmental superiors and the offending piece of guidance was in essence destroyed by the declaration thereby preventing its future application to other prisoners' requests.

These cases clearly show judicial scrutiny of procedural guidance in this area of central government administration growing in scope and severity. The judiciary have invoked the,by now familiar,concepts of natural justice and fairness to provide the benchmarks for their evaluations. In addition the somewhat nebulous notion of citizens' "civil rights" has also been resorted to by the judges as a measurement of the legality of these provisions (whatever its precise contents this requirement is likely to be classified as a public law right and therefore normally enforceable only via Order 53,as happened in Anderson). We can speculate that a major motivation behind this judicial trend has been the decisions of the European Court and

Commission for Human Rights in the series of cases brought before them by British prisoners (see Chapter One). Even though those decisions are not binding precedents upon our domestic courts they vividly demonstrated how the earlier judicial response was lagging far behind contemporary international standards of basic human rights and may well have stimulated our judiciary to provide a more effective domestic remedy for similar complainants[146]. Furthermore the European cases increased the knowledge of domestic commentators and practitioners about the nature of the complex regime of norms governing prison administration thereby facilitating legal actions in our own courts. There does not appear to be any a priori reason why an analogous form of scrutiny should not be extended to other pieces of procedural guidance (the Customs and Excise guidance on compounding procedures would be ideally suited to evaluation in terms of the requirements of fairness and elementary criminal procedure[146*]). However,such a development is in practice dependent upon public awareness of the existence of guidance and the willingness of the judiciary to counte nance such actions.

(2) Judicial Enforcement of Procedural Guidance

The converse of the judicial trend examined above occurs where courts intervene,to require departments to observe their published procedural guidance,or at least determine decisions made in violation of those

procedures to be unlawful. This development in the judicial response to guidance is of very recent origin and really only entered our domestic law in 1984. Prior to that time there does not appear to have been any distinct legal principle demanding the observance of such guidance,as the case of R. v. Lamb[147] demonstrated. There the Home Office had issued guidance in the form of a circular (No.109/1978) setting out the procedure which the police should follow when using photographs to help witnesses identify criminal suspects. That guidance had been ignored in the investigation of the appellant's alleged criminal behaviour and subsequently he had been convicted on the basis of evidence derived from visual witnesses. The Court of Appeal quashed his conviction on the ground that it was unsafe but Lawton LJ observed,

"[counsel] has not suggested that the mere fact that there was a breach of a paragraph in the Home Office circular,entitles the appellant to have his conviction quashed. He puts his case on a more sensible basis. He says that the fact that there was a breach,is a factor which has to be taken into account by this court when deciding whether the verdict is either unsafe or unsatisfactory."[148]

So the court's evaluation of this breach was undertaken without the benefit of any explicit legal framework establishing when it is desirable that public officials should observe procedural guidance-even where the procedure is designed to protect the reputation and possibly the liberty of individuals. Perhaps this failure was due to the limited exposure of the criminal courts to procedural guidance (if so their experience is likely to be even less in the future now similar provisions are embodied in the statutory Codes issued

under the P.A.C.E. Act). Consequently we should look to the civil courts as the dominant forum for the elaboration of relevant principles.

It was the Privy Council,in the first instance, which directly confronted the question of whether there were circumstances where the common law required the observance of procedural guidance by the promulgating department. In A.G. of Hong Kong v. Ng Yuen Shiu[148] the respondent challenged a deportation order made against him by the Government of Hong Kong on the ground that he had not received a fair hearing prior to the order being made. His basis for arguing that he was entitled to a hearing satisfying the demands of fairness was that he had a "legitimate expectation" of such a hearing. This expectation,he claimed,had its origins in a statement read out to a group of protesting individuals by a civil servant in which the Government pledged to accord interviews to all illegal immigrants from Macaou before deciding whether to deport them. The Privy Council accepted his contention and held,in the words of Lord Fraser,

"in the opinion of their Lordships the principle that a public authority is bound by its undertakings as to the procedure it will follow,provided they do not conflict with its duty,is applicable to the undertaking given by the Government..."[149].

Their reasoning was that,

"...when a public authority has promised to follow a certain procedure,it is in the interests of good administration that it should act fairly and should implement its promise,so long as implementation does not interfere with its stautory duty. The principle is also justified by the further consideration that,when the promise was made,the authority must have considered that

it would be assisted in discharging its duty fairly by any representations from interested parties and as a general rule that is correct."[150]

Consequently the Privy Council was attaching legal effects to a procedural undertaking that was addressed, again note how guidance can be disseminated in a variety of informal ways, generally to a section of the population,rather than to the respondent personally. The nature of those effects can be interpreted on two levels.

At the most specific level the decision can be said to demonstrate the judiciary treating procedural guidance which provides for a hearing to be given to individuals prior to a determination affecting them as creating a legitimate expectation of the opportunity to be heard which will allow those individuals to challenge any subsequent decision reached without a hearing. Secondly,and at a more general level,the opinion can be read as establishing a legal requirement that public bodies observe their procedural guidance whatever its content. As Jackson commented,"the most significant feature of [the case] may well be not that it extended the scope of the right to a hearing but that it enforced against a public authority a statement of intent made by that authority..."[151]. This latter perspective is more in keeping with the breadth and generality of the language used by Lord Fraser in the extracts above. Furthermore it replicates the requirement (and exceptions) laid down for the observance of policy guidance in Liverpool Taxi which provided the

intellectual origins for much of his Lordship's reasoning. Therefore,it may be hypothesised that the Privy Council was just as concerned to protect individuals "in the interest of good administration" from the apparent arbitrariness of deviations from declared procedures as the Court of Appeal had been to ensure that public bodies did not inexplicably abandon their announced policies. Hence this decision established a potential foundation and framework for the judicial enforcement of procedural guidance.

The first application of Shiu in our domestic law occurred in Khan and supported the widest interpretation of the Privy Council's reasoning. The circular letter distributed by the Home Office in Khan's case not only contained the policy guidance considered previously but also procedural guidance detailing the investigations the department would undertake via the D.H.S.S. and local social services departments to ascertain if the applicants would be suitable adopters. Therefore,a second strand of Mr. Khan's claim was that the department's decision was unlawful because they had failed to carry out the procedures required by their guidance. Parker LJ accepted this argument holding,

"[Shiu] is,of course,not binding on this court but is of high persuasive authority. In my view it correctly sets out the law of England and should be applied. I have no doubt that the Home Office letter afforded the applicant a reasonable expectation that the procedures it set out,which were just as certain in their terms as the question and answer in Mr. Ng's case, would be followed..."[152].

In his judgment this reasonable/legitimate expectation was sufficient not merely to provide Mr. Khan with locus

standi but also to entitle the latter to succeed in his substantive claim. As the Home Office's guidance established procedures going beyond those of a basic hearing (ie. creating an inspection system involving two central departments and relevant local authorities) the Lord Justice obviously understood Shiu as creating the legal principle that all forms of procedural guidance should generally be observed and not merely that guidance providing for a hearing produced a legitimate expectation that such a hearing would be granted. The dissentient,Watkins LJ,did not deny the applicability of Shiu but sought to distinguish it on the facts of Khan's case. So it can be said that the widest interpretation of Shiu has received endorsement in the Court of Appeal.

Nevertheless when the House of Lords considered the concept of legitimate expectation a few months later (without being referred to Khan which had not then been reported) in the C.C.S.U. case there were obiter statements that would give a more restrictive scope to the enforcement of procedural guidance via this concept. There the basis of the appellants' contested legitimate expectation was the previous conduct of the Foreign Office in consulting the unions about working practices at G.C.H.Q.,but some of their Lordships used the occasion to elaborate upon the ambit of this rather nebulous concept. Lord Fraser invoked his opinion in Shiu to support the view that a legitimate expectation could also arise "from an express promise given on

behalf of a public authority"[153]. Such a definition would not undermine Parker LJ's use of the concept in Khan. However, Lord Diplock's view was that a legitimate expectation could only be said to develop in such circumstances where the individual "has received assurance from the decision-maker [that a benefit or advantage] will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn"[154]. This conception of the relevance of legitimate expectation to procedural guidance would appear to restrict it to guidance that only provides for a right to a hearing and has echoes of the narrow interpretation of Shiu. Consequently it would be a regressive step after the decision in Khan. Perhaps Lord Diplock's views can be treated either as obiter dicta in the light of the type of legitimate expectation actually being asserted by the appellants, or as a statement of the use of this concept as a means of establishing locus standi rather than a substantive ground for reviewing the legality of decisions[155].

To summarise this aspect of the judicial response towards procedural guidance we can observe that Parker LJ's judgment in Khan provides the English courts with the basic framework for the legal enforcement of this form of guidance. Whatever the method of promulgation (c/f the informality in Shiu) and irrespective of the nature of the procedures detailed by the guidance (c/f the elaborate investigatory process specified in Khan) the legal presumption is that the promulgator will

observe those procedures. But the presumption is not competely irrefutable and will give way where the department's "statutory duty" so requires. What the Privy Council meant by that phrase was not made clear. However, it may be suggested that it is analogous to the concept of "public interest" which the Court of Appeal invoked as the caveat to the enforcement of policy undertakings in Liverpool Taxi a decision which,as we have already noted,was heavily relied upon by the Privy Council. Such a meaning would enable the department to change its procedural guidance where it deemed the public good would so require. Yet in the normal course of events,if a department failed to follow its procedural guidance,any subsequent decision would be liable to be quashed by the judiciary for violating the legitimate expectations of individuals relying on those provisions. Consequently Jergesen's view that the violation of these provisions is not a matter for judicial contemplation is no longer an accurate picture of contemporary jurisprudence.

(3) Departmental Reliance Upon Procedural Guidance

The final case that we shall examine is not only interesting because it demonstrates a Secretary of State invoking the existence of procedural guidance as the satisfaction of a statutory duty,but also its revelation of judicial naivety in comprehending the responses of bureaucratic organisations towards administrative guidance of all forms. The case of Child Poverty Action Group v. Chief Adjudication Officer and Another[156]

centred around the extent of the Secretary of State's duties under s.27(1) Supplementary Benefits Act 1976 which stated,"It shall be the duty of the Secretary of State to make arrangements with a view to ensuring that benefit officers and other officers of his concerned with the administration of this Act exercise their functions in such a manner as shall best promote the welfare of persons affected by the exercise of those functions." As a consequence the Secretary had promulgated a manual for use by his officials explaining "the law and administration" of the social security scheme which contained 16,000 paragraphs! This manual in part established a procedure for communicating decisions of insurance officers to benefit officers. However,a review by the Social Security Inspectorate in 1983 indicated that about 1% of unemployed people claiming supplementary benefits might not have received their full entitlement due to a widespread failure of clerical officers to follow the above procedural guidance. The Secretary of State conducted two national publicity campaigns to draw the attention of the 17,000 odd affected claimants to the need for them to apply for their full entitlements, but because of the administrative costs involved (£4:8 millions) he decided not to instruct his staff to search through all the relevant case papers to track down the affected individuals. The C.P.A.G. and the G.L.C. brought this action arguing,inter alia,that the Secretary of State's decision not to instruct his officials to try and

identify the affected claimants was a breach of his duty under s.27. The Court of Appeal rejected that proposition and interpreted the Minister's duty as being,in the words of Sir R. Cumming-Bruce,simply,

"...a general administrative duty concerned with the promulgation of procedures which will best promote the interests of the various classes of claimants. It is accepted that the administrative guidance incorporated in the voluminous and detailed instructions given by the Secretary of State would have achieved the desired affect if they had been followed. ...The words are not apt to impose a duty not only to issue sensible instructions but also to institute a policing activity involving hunting through millions of cases...".

Hence the court appeared to think that the Secretary of State had satisfied his duty to make "arrangements" merely by issuing comprehensive guidance. However, if the court had been aware of informal organisational behaviour (see the theoretical writings on this topic discussed in Chapter Two and the empirical analysis of its existence in the S.E.D. considered in Chapter Three) they would have appreciated that simply issuing instructions to members of complex organisations is not sufficient of itself to guarantee a uniform observance of those provisions,and that they must be accompanied by training programmes and hierarchical reviews of subordinates' actions by their superiors. There was no evidence that the Secretary of State's manual established such administrative structures and to that extent it could be argued that he had not made suitable "arrangements" for the exercise of his officials' functions. The court's attitude may be explained by their relative ignorance (eg. when compared with that

displayed by the P.C.A.) of the organisational realities existing within departments. This is a potential weakness underlying not only their reactions towards administrative guidance but the whole concept of judicial review.

CONCLUSIONS

The analysis of the case law contained in the previous sections of this chapter has provided the detailed answers to most of the specific questions posed at the beginning of our examination. Therefore,in this conclusion we shall consider the main themes in the judicial response to administrative guidance underlying those answers. We can note that the judiciary have become increasingly tolerant of the promulgation and use of guidance by departments. All three categories of guidance have received judicial approval as the cases of British Oxygen (policy guidance),Crake (interpretative guidance) and C.P.A.G. (procedural guidance) demonstrated. The identity of the particular department which promulgated the guidance does not appear to be a significant factor amongst those which influence the judicial response to guidance. Undoubtedly the matter which is of primary importance in determining that response is the substantive content of the individual piece of guidance. This is because,if the substance of such a provision violates any of the relevant principles of public law (eg. the non-delegation doctrine as in Jackson Stansfield),or the modified

versions of those principles which have been evolved to regulate guidance (eg. the non-fettering principle as refined in British Oxygen),the courts are able to prevent departments from acting upon the offending piece of guidance.

As we have seen affected citizens can challenge allegedly unlawful administrative guidance either directly,or indirectly via an attack on individual decisions reached in pursuance of the particular guidance. The cases discussed highlight only one case (Anderson) in which a direct challenge to the legality of the content of a piece of guidance resulted in a declaration that the provision was ultra vires. Other notable direct challenges which ultimately failed in the House of Lords include British Oxygen, Royal College of Nursing, and Gillick. Furthermore,as we have already mentioned,if the dicta of Woolf J in Royal College and Lord Bridge in Gillick are taken up by their judicial colleagues, citizens wishing to bring such direct challenges are almost certainly going to be required to utilise the Order 53 procedure. Consequently the procedural obstacles facing these challenges will increase rather than decrease with,as a corollary,a likely reduction in the success rates of direct challenges. However,the cases examined showed that citizens were successful in their use of indirect challenges in eight actions (Stansfield, Simms, M'Lean, Colmans, Lavender, Simper, St Germain, and Raymond). These indirect challenges had occurred in several

heterogeneous types of proceedings including,(a) defences to criminal charges (M'Lean, Simms), (b) defences to civil actions (Stansfield), (c) civil actions initiated by citizens impugning the validity of decisions made in consequence of the application of unlawful guidance (Colmans etc.). Again, where the citizen seeks the quashing of a departmental decision applying unlawful guidance via a prerogative order,they will now have to utilise the Order 53 procedure. Following Lord Bridge's comments and the Court of Appeal's judgment in C.P.A.G. the judiciary may be reluctant to accept that representative actions brought by interest groups have the required locus standi so the onus is placed upon affected citizens to litigate individually. We can hypothesise that the judiciary have been more amenable to indirect,as opposed to direct,challenges aimed at administrative guidance because they can see the concrete harm suffered by citizens where departments have utilised unlawful guidance. By contrast direct challenges may involve abstract claims of illegality without the occurrence of actual harm (eg. in Royal College there was no evidence that any nurse had been prosecuted for procuring an abortion under the Offences Against the Persons Act 1861) and as Lord Bridge said in Gillick the courts should avoid "proferring answers to hypothetical questions of law".

The converse of the above judicial response to administrative guidance has been the recent trend in the

case law towards the legal enforcement of these provisions. There are now dicta that a legal presumption exists that departments should observe their promulgated guidance irrespective of what category of guidance is involved as the cases of, Khan (policy guidance),H.T.V. (interpretative guidance),and Shiu (procedural guidance) demonstrate. The circumstances in which departments can depart from the requirements of their promulgated guidance are also very similar; where the "overriding public interest demands it" per Parker LJ in Khan, where there is an "overriding public interest to warrant it" per Lord Denning in H.T.V. , and where observance would "interfere with its statutory duty" per Lord Fraser in Shiu. The content of the phraseology of these caveats may be subject to elaboration by the judiciary in future cases, but it is likely that the judges will leave departments with a fairly wide area of discretion because they are in a better position to make such value judgments,under the direction of Ministers,than the courts. The similar features of this legal presumption and its ancillary exceptions across the categories of guidance is not that surprising when we consider the common origins of the presumption which are to be found in the judgment given by Lord Denning in Liverpool Taxi. All the major judgments developing the judicial enforcement of guidance make reference to Lord Denning's innovative application of the doctrine of "fairness" to achieve this requirement, and it is "fairness" together with the allied concept of "legitimate expectation"

which provide the legal foundations for this presumption.

Finally,to summarise the trends in the case law we can state that there is an emerging legal presumption that departments will observe their promulgated administrative guidance,but this is subject to an overriding exception that departments can depart from such guidance where the public interest so necessitates. Furthermore affected citizens can challenge the legality of guidance either directly or,with a greater chance of success,indirectly on a number of grounds including;the unlawful delegation of decision-making powers (Lavender),the fettering of the exercise of discretionary powers (Simms),the incorrect interpretation of statutory language (M'Lean),and the establishing of decision-making procedures which fall below the minimum standard prescribed by the common law (Anderson). Consequently the judiciary have,to some extent unconsciously, established the basis for a coherent and relatively comprehensive legal response to the creation and use of administrative guidance by central government departments.

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03 [1983] 1 WLR 447.
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05 [1983] 3 All ER 821.
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71 Ibid. 732.
72 (1961) SC 350.
73 Ibid. 359.
73*We have already noted in Chapter 3 how the the S.E.D. had never faced legal challenges to their administration of students' grants,presumably this case

would provide a legal basis for their utilisation of policy guidance.

74 Op. cit. 358.
75 [1984] 3 WLR 1174.
76 [1948] 2 All ER 558.
77 Ibid. 565.
78 R E Megarry "Administrative Quasi-Legislation" 60 L.Q.R. 125.(1944).
79 [1948] 1 All ER 85.
80 Report Cmd 4060 (1932).
81 [1970] 3 All ER 871.
82 Ibid. 880.
83 On the office of Secretary of State see Wade and Bradley Constitutional and Administrative Law 10th. ed. 266-267.
84 The Times 7/11/1985. The discussion in this work is based upon the transcript obtained via Lexis.
85 Loc. cit. .
86 Op. cit. 307.
87 A R Mowbray "Administrative Guidance and Judicial Review" [1985] P.L. 558.
88 [1972] 2 All ER 589.
89 Ibid. 594.
90 Ibid. 596-597.
91 [1949] 1 KB 227.
92 [1967] 2 All ER 1041.
93 [1971] 1 QB 222.
94 On this topic see H W R Wade Administrative Law 5th.ed. 232.
95 [1981] 2 All ER 204.
96 see D J Mullan "Fairness: The New Natural Justice" 25 Uni. of Toronto L.J. 281. and M Loughlin "Procedural Fairness: A Study of the Crisis in Administrative Law Theory" 28 Uni. of Toronto L.J. 215.
97 [1985] 1 All ER 40.
98 Ibid. 48.
99 [1947] 2 All ER 680.
100 Op. cit. 52.
101 see The Morality of Law ch.2.
102 eg. Silver and Others v. U.K. 5 EHRR 347 discussed in Chapter 1.
102*Compare the examples of idiosyncratic applications of guidance by S.E.D. officers discussed in Chapter 3.
103 [1972] 3 All ER 1019.
104 Op. cit. 218.
105 Op. cit. 1023.
106 Op. cit. 728.
107 Op. cit. 218.
108 P P Craig "Participation,Proces and Democracy" A L G Annual Meeting Oxford 10/4/1986.
109 Richard B Stewart "The Reformation of American Administrative Law" 88 Harvard L.R. 1669.
110 [1968] 1 All ER 694.
111 Ibid. 699.
112 [1976] ICR 181.
113 Ibid. 188.
114 [1973] 2 All ER 461.

115 (1939) SC 52.
116 Ibid. 59.
117 Op. cit. 551.
118 [1968] 2 All ER 832.
119 Ibid. 835.
120 [1982] 1 ALL ER 498.
121 Ibid. 505.
122 [1975] 3 All ER 976.
123 Ibid. 982.
124 [1976] ICR 181.
125 Ibid. 185.
126 Ibid. 189.
127 Ibid. 192.
128 [1985] 2 WLR 836.
129 Ibid. 852.
130 see G H Treitel The Law of Contract 6th. ed. ch.20.
131 Allan D Jergesen "The Enforcement of Administrative Procedures in G.B. and the U.S." 30 Am.Journal of Comp.Law 267.
132 Ibid. 294.
133 For an account of their work see D G T Williams "The Council on Tribunals:The First 25 Years" [1984] P.L. 73.
134 Op. cit. 271.
135 [1979] 1 All ER 701.
136 [1943] 1 ALL ER 154.
137 Op. cit. 707-708.
138 [1979] 3 All ER 545.
139 [1982] 2 WLR 465.
140 Ibid. 468.
141 Ibid. 470.
142 Ibid. 472.
143 [1984] 1 All ER 920.
144 [1980] 3 EHRR 475.
145 Op. cit. 928-929 and 928.
146 On the issue of the significance of the E.C.H.R. for our domestic law see,Jeremy McBride,"The E.C. H.R. and the Protection of Civil Liberties in the U.K." in Civil Liberties 1984 ed Peter Wallington. Also Clive Symmonds,"The Effect of the E.C.H.R. on the Preparation and Amendment of Legislation, Delegated Legislation and Administrative Rules in the U.K." in The Effect on English Domestic Law of Membership of the European Communities and of Ratification of the E.C.H.R. ed M P Furmston et al.
146*C.486/81 H.C.8 (1982-83).
147 (1980) 71 Cr App R 198.
148 [1983] 2 WLR 735.
149 Ibid. 742.
150 Loc. cit. .
151 Paul Jackson,"Legitimate Expectation and Good Administration" 99 L.Q.R. 499 at 500.
152 Op. cit. 48.
153 Op. cit. 1187.
154 Ibid. 1194.
155 On this point see,Keith Davis,"Judicial Review and Legitimate Expectation:the G.C.H.Q. Case" in All E R Rev 1984 1.

156 The Times 8/8/1985. The following discussion is based on the transcript obtained via Lexis.

CHAPTER SEVEN

VALUE ADDED TAX TRIBUNALS

Introduction

In this chapter we shall examine the responses towards administrative guidance of the final domestic grievance handling agency to be considered by this work and that is a tribunal system. Such an institution deserves a place in our research because as Birkinshaw has noted tribunals are now,"...a central feature of dispute resolution by adjudication in cases involving departments and individuals..."[1]. However, we must further appreciate that the historical debate over the conceptual nature of tribunals has not yet ended. Within a quarter of a century two official committees had considered this question and reached diametrically opposed conclusions. The Donoughmore Committee perceived tribunals to be extensions of their sponsoring departments and signified this conclusion by terming them "Ministerial Tribunals"[2]; whereas the subsequent Franks Committee expressed their understanding of tribunals in the following manner,

"tribunals are not ordinary courts,but neither are they appendages of Government departments... We consider that tribunals should properly be regarded as machinery provided by Parliament for adjudication rather than as part of the machinery of administration."

Undoubtedly this latter Report both legitimised and

established the contemporary orthodoxy regarding the fundamental characteristics of tribunals. As Wraith and Hutchesson wrote,Franks,

"...represents a watershed between a recent past when tribunals were regarded as unavoidable expedients and a future where they are coming to be accepted for what they really are-an important part of the judicial system of the country."[4]

But not all commentators accept the universal applicability of the above conceptual model of tribunals. Farmer,in particular,has strongly argued that the Franksian model does not adequately take account of the "Policy Orientated" type of tribunal. These tribunals he contends differ dramatically from the Franksian,or as they are sometimes referred to "Court Substitute" form of tribunals,because of their lack of independence from their sponsoring departments. As Farmer states the basic difference between the two types of tribunals,

"...is to be found in the power which the minister retains to issue directions to such tribunals. In practice these directions may relate to procedure or,of vital significance here,to policy. In this latter case it is the minister and not the tribunal who determines policy."[5]

Despite Farmers' post Fulton[6] prediction of an expanding usage of policy orientated tribunals by government this evolution has been rather hesitant in its arrival. But more recently Baldwin claims that the "Independent Regulatory Agency",an institution sharing many similar features with policy orientated tribunals,offers great potential as an instrument of government in a decade epitomised by the "privatisation" of public assets

because,"...for Conservatives it provides a means of public control that may be substituted for nationalization."[7]

Nevertheless, the majority of existing tribunals are more likely to resemble the Franksian model than the policy orientated form;consequently this work will focus upon a tribunal system falling within the first category. Furthermore by choosing such a system we shall facilitate the comparison between the responses of the courts and the tribunal towards administrative guidance as the latter body will be performing broadly analogous functions to those of the former;hence our findings will enable us to further our knowledge of the extent to which such tribunals both replicate judicial reasoning and perceive the relationship between individuals and central departments.

Inevitably the next issue which this research had to face was the selection of a particular tribunal system for detailed scrutiny. With 103 different tribunal systems falling under the general supervision of the Council on Tribunals in 1985[8] it was clearly impossible to examine all the various tribunals![9] Three factors were considered to be dominant in determining the selection process. First it was clearly necessary for the tribunal to encounter administrative guidance in its decision-making. Secondly the decisions of the tribunal had to be readily accessible in order that they could be analysed. Thirdly it was important to avoid tribunals which had already been subjected to exhaustive

study (eg. the former Supplementary Benefit Appeal Tribunals[10]) both to prevent any possible duplication of research and to increase our general awareness of the different types of tribunals. The tribunal system eventually selected was that of Value Added Tax (hereafter V.A.T.) Tribunals because it satisfied the above conditions in the following ways. In the light of our research into the P.C.A. (Chapter Five) we learnt that the whole area of taxation demonstrated a considerable use of administrative guidance by the two departments concerned with the collection of taxes. Therefore,it seemed a reasonable prediction that a tribunal determining questions of taxation would be likely to encounter guidance during its deliberations. However,as Oliver has noted, the official reporting of tax tribunal decisions is not very well developed.[11] Hence V.A.T. Tribunals stood out as an exception to the norm as selected decisions given by them are published annually by H.M.S.O.. Furthermore there does not appear to be any published research on the decision-making or jurisprudence of these tribunals.[12]

The Legal Background to V.A.T.

V.A.T. replaced Purchase Tax,which had originated as an emergency war time measure during 1941,in April 1973. There were two forces encouraging this change,firstly the inherent weaknesses of Purchase Tax (namely its exclusion of liability to pay tax on the obtaining of services and its taxation of exported goods),and secondly Britain's membership of the European

Communities which necessitated a degree of harmonisation of consumer taxation. Therefore,Parliament created V.A.T. by Part 1 of the Finance Act 1972. Pinson summarises its method of application in these terms,

"V.A.T. is a tax on the final consumption of goods or services which is collected by instalments. The tax is charged on the "value added" by a taxable person at each stage in the process of production. In practical terms the "value added" is the profit (including wages) of the taxable person computed on an invoice basis. Thus,in effect the instalment of tax due at each stage is the amount chargeable on the difference between the cost of acquisition and the proceeds of sale."[13]

The advantage this form of tax offers over a simple sales tax is that ultimately only non-business consumers pay the levy.

The scheme for the assessment and collection of V.A.T. will now be briefly outlined in terms of the statutory provisions. Although most legislation involving V.A.T. has been consolidated in the Value Added Tax Act 1983 we shall primarily refer to the 1972 Act as that is what the tribunal decisions discussed below applied. By s.1(1) Finance Act 1972 (now s.1(1) V. A.T. Act 1983) V.A.T. was levied on the supply of goods and services in the U.K.. However,s.2 (s.2) provided that only supplies of taxable goods and services by a taxable person were liable.[14] Where a person paid V.A.T. on the supply of goods or services used by him for the "purpose of a business" he could reclaim that amount as input tax according to s.3 (s.14). Section 9 established a standard rate of tax at 10%, but that has been increased to 15% by s.9(1)(a) 1983 Act. Those goods and sevices which were to be taxed at a zero rate were

specified in s.12 and Schedule 4 (s.16 and Schedule 5), whilst those exempted from V.A.T. were listed in s.13 and Schedule 5 (s.17 and Schedule 6). Where a taxpayer did not submit returns to the Commissioners or provide them with satisfactory documentation they could assess him for that amount of tax which they calculated to the "best of their judgment" under s.31 (now Schedule 7) to be due. By s.37 the department was given powers of entry and search (Schedule 7), and s.38 (s.39) created several offences relating to the unlawful evasion of Value Added Tax. At this juncture we can comprehend Mainprice's criticism that,"what the Government was careful not to publicise in 1972 is now plain:the legislation in the 1972 Finance Act is only the framework for V.A.T.."[15] As we shall soon discover this technique of enactment has had direct effects upon the nature and legal status of the guidance promulgated by the Commissioners.

The Characteristics of V.A.T. Tribunals

Separate tribunals with jurisdiction over each constituent part of the U.K. (subject to V.A.T.) were created by Paragraph 1 Schedule 6 of the Finance Act 1972 (now Para.1 Schedule 8 V.A.T. Act 1983). But unity was brought to the system by appointing a single President with responsibility for all tribunals. The President was to be a person qualified for office as a Crown Court Recorder and his appointment was to be made by the Lord Chancellor. For the era of our research the

Presidency was occupied by Lord Grantchester Q.C.. He obtained the Treasury's consent to the establishment of a tribunals headquarters in London with regional offices in Belfast,Edinburgh and Manchester. Whilst the tribunals also conduct hearings in Birmingham,Cardiff, Leeds,Exeter,Newcastle and Castletown (for the Isle of Man). Each tribunal is to be composed of a Chairman and at least one other Member. Panels of Chairmen and Members for the English and Welsh,Northern Irish,and Scottish tribunals were created with a minimum of one full time Chairman for each panel. Full time Chairmen were to be appointed by the Lord Chancellor,or his appropriate judicial equivalent in the other legal systems of the U.K.;whilst other tribunal members were to be nominated by the Treasury.

The substantive jurisdiction of V.A.T. Tribunals was originally specified in nine grounds of appeal detailed in s.40(1) Finance Act 1972. These grounds contained matters such as disputes over the registration of persons liable to pay the tax (s.40(1)(a));and contentions regarding the amount of output tax due from a taxpayer (s.40(1)(c)) or conversely the sum of input tax a taxpayer could reclaim (s.40(1)(d)). Over the years these grounds were gradually extended so that today there are thirteen grounds of appeal. This process appears to be a never ending one as s.24 Finance Act 1985 recently added another ground to take account of the Commissioners new power to impose penalty payments on tardy taxpayers. At the current time tribunals can

hear appeals based upon approximately fourteen different matters. However,as Pinson observed,routinely,

"many of the disputes relate to the classification of a particular supply,ie whether it is taxable or zero rated or exempt."[16]

The provisions governing the interlocutory,hearing and decision-making stages of tribunals determinations are found in the V.A.T. Tribunals Rules 1986 (Order 1986/590). They provide that the appellant must normally lodge an appeal within 30 days of receiving the Commissioners' letter containing the disputed decision. Within a further 30 days the Commissioners must serve a statement of the grounds for their decision. The parties to the appeal then exchange any relevant documentation. An appellant must be given at least 14 days notice of the timing of the hearing. The hearing is an oral one before a duly constituted tribunal whose Chairman and other Members have been selected by the President from the appropriate panels. At the hearing the appellant can be represented by anyone of his own choice(quite frequently appellants are represented by an accountant rather than a lawyer)and he bears the burden of proof in the proceedings. According to the President proceedings before any particular tribunal should observe the following form,

"the appellant or his representative will be entitled to address the tribunal, call witnesses, produce documents, cross-examine any witnesses called by the Commissioners, and make a second statement closing his case. The appellant himself may give evidence. The representative of the Commissioners will be entitled to address the tribunal,call witnesses,cross-examine any witnesses called by or on behalf of the appellant (including the appellant if he gives evidence) and make a second statement closing their case. The tribunal may question

any witness (including the appellant if he gives evidence)."[17]

The chairman of the tribunal may announce an oral decision at the end of the hearing,but a written letter containing the tribunal's findings of fact,decision and supporting reasons will always be sent to the appellant. The tribunals have the power to award costs against a party to the appeal;however,it is not their policy to award costs against a wholly successful party. Finally if a party considers that the tribunal has made an error of law they have a right of appeal on such a point to the High Court,or its equivalent in other jurisdictions. Now that we have considered the formal constitutional position of these tribunals we can begin our study of their jurisprudential response to administrative guidance.

The Responses of V.A.T. Tribunals to Public Notices (1973-1982)

As we have already noted our earlier research on the P.C.A. indicated that the Commissioners issued Public Notices in which they,inter alia,announced their views regarding the legal liabilities of taxpayers[18]. These Notices seemed a likely source of administrative guidance,therefore the department was contacted to obtain further information concerning them. It was then discovered that in relation to V.A.T. the Commissioners had created an extensive body of Notices with an elaborate up-dating mechanism. At the time of the initial research there were 22 Notices supplemented by 50 leaflets. The Notices covered a diverse range of

subject matters. For example Notice 712 entitled "Second -hand works of art, antiques and scientific collections" explained its scope thus,

"V.A.T. is normally chargeable on the full value of goods sold by a taxable person. But for second-hand works of art,antiques and scientific collections there is a special scheme whereby,subject to certain conditions,tax is chargeable only on the margin by which the selling price of the article exceeds its purchase price. ... This Notice explains what types of goods are covered by the scheme,how it works and what records must be kept."[19]

Whilst Notice 708 entitled the "Construction Industry" stated,

"This Notice deals with the application of V.A.T. to the construction industry,and in particular to the construction,alteration,and repair or maintenance of dwelling accommodation, commercial and industrial buildings and of civil engineering projects such as roads,bridges and tunnels..."[20].

Leaflets dealt with even more specialist activities such as SHP 10 which explained the

"...arrangements whereby V.A.T. incurred on materials and certain other goods and services used in (self-build projects) may be reclaimed from HM Customs and Excise where the work has been carried out by a voluntary organisation..."[21].

Consequently we can conclude that both Notices and leaflets demonstrated many features resembling those of the model guidance outlined in earlier Chapters of this work. These included their generality of coverage in that they applied to all taxpayers coming within their ambit eg. Notice 708 governed all businesses engaged in the construction industry and not just company x. Furthermore none of these publications had been subjected to any Parliamentary proceedings and most of their contents were not derived from the exercise of

delegated legislative powers (eg. in the General Guide to V.A.T. Notice 700 the Commissioners stated that 9 out of 80 pages were the product of delegated legislative powers). Finally,as we shall see in greater detail below,the Commissioners claimed that these provisions reflected the working norms under which they actually administered V.A.T..[22]

The next step was to ascertain those cases where V.A.T. Tribunals had considered the legal significance of these Notices. This was done by scrutinising the reported decisions of the tribunals over the first decade of collection of the tax. Such a time-scale was lengthy enough to reflect any evolutions in the responses of the tribunals and neatly encompassed the currency of Part 1 Finance Act 1972. During the former period of the research access to tribunal decisions via Lexis was not available and therefore the searching had to be conducted manually. This process repeated the techniques used to identify P.C.A. cases for Chapter Five and involved examining all decisions for the relevant years and noting those which raised novel issues concerning Notices. Out of 296 reported decisions 20 were found which fundamentally revolved around Notices or connected issues (these are listed in Appendix C). Subsequently the accuracy of this searching was extended by a use of Lexis[23].

From the cases found by the above methods it became clear that the dominant factor determining the response of tribunals to Notices was the nature of the power

exercised by the Commissioners when promulgating the particular provisions. So our ensuing analysis of those responses will be based upon that distinction.

a. Public Notices (or parts of them) issued under statutory authority

The case of A L Housden v. The Commissioners of Customs and Excise[24] vividly demonstrated the reaction of the tribunals to Notices, or as there parts of Notices,which were the product of legislative powers. By s.30(3) 1972 Act the Commissioners were granted the power to make Regulations and Notices establishing approved methods of calculating taxable turnover. Exercising that power the Commissioners published Notice 727 together with associated supplements which,inter alia,contained the details for calculating the turnover of businesses supplying both standard and zero rated supplies. One requirement of this method was that,"the initial stocks you are holding when you begin to use Scheme B must not be included". The appellant entered into a contract to purchase an existing business in September 1979,started to trade in early November and completed the purchase later that month. She used the above method of accounting but sought to claim for initial stock. The department refused her claim and she appealed on the ground that as she did not have legal title to the stock when she began trading she fell outside the above restriction. The tribunal concluded that,

"in assessing the legal effect of Notices it is important to bear in mind what was said by Woolf J in G.U.S. Merchandise Corp. Ltd. v. The Comms. [1980] 1 W L

R 1508 in particular relation to Notice 727,"in considering these Notices it has to be borne in mind that they are far from being the normal form of delegated legislation. Although they do set out what is ,in effect,a statutory scheme,they also contain advice and recommendations which are of no statutory effect." In the judgment of the tribunal [the above requirement] has statutory,or quasi-statutory,effect...we take the view that the provision...is not a provision to which a test of reasonableness is open to be applied by a V.A.T. Tribunal."[25]

Consequently the tribunal considered they were bound to apply the restriction,and further rejected the appellant's argument on the interpretation of "holding" by declaring it to mean possession not full legal ownership. Therefore,it is apparent that where tribunals encounter Notices derived from statutory powers,whether primary or delegated,they generally understand themselves to be obliged to apply the terms of those provisions.

However,the task of determining if any particular requirement of a Notice has this effect is no simple mechanical task as ~~Douglas Howard Miller~~ v. ~~The Comms.~~[26] showed. Under s.14 1972 Act the Commissioners were given the power to make Orders creating a scheme whereby the retail sellers of second hand goods,bought from members of the public,only had to pay tax on the difference between the purchase and sale prices. Using that power the Commissioners made the V.A.T.(Works of Art,Antiques and Scientific Collections) Order 1972 (1972/1971). That Order in turn authorised the Commissioners to specify the book-keeping requirements of the Scheme in a Notice. This the Commissioners did in paragraph 18 of Notice 712 which they later purported to amend by a publication

entitled "V.A.T. News No.2". During 1976 a control visit was made to the appellant's business and it was discovered that he had failed to comply with the accounting requirements. He subsequently appealed against the ensuing assessment. The tribunal expressed their concern about this contorted process of legislating in the following words.

"The publication of "V.A.T. News No.2" does not even purport to be a Notice,let alone a Notice published for the purpose of the Treasury Order... We have some doubts whether [it] should properly be regarded as a Notice published for the purpose of the Treasury Order and,in connection therewith,we draw attention to the fact that other Notices,published by the Commissioners under powers entrusted to them were altered by a publication entitled "V.A.T. News Amendment Leaflet No.1".[27]

However,the tribunal dismissed the appeal because the appellant's books did not comply with the demands of Notice 712.

The tribunal's concern about the Commissioners' methods of legislating gives fuel to Mainprice's constitutional apprehension that,

"...with the advent of V.A.T. a much more objectionable procedure has been instituted namely legislation by departmental notice. This system short circuits Parliament completely and the process is so simple that it is doubtful if more than a handful of Members of Parliament have any idea of the way in which their legislative function has been eroded by its use."[28]

Not only may M.P.s be unaware of the scale of this form of legislation, but they also have no knowledge of the contents of such subordinate legislation as it does not come under the scrutiny of the Joint Committee on Statutory Instruments nor is it laid before the House. Therefore,we may begin to hear distant echoes of Scott LJ's criticisms of multiple stages of delegated

legislation expressed in Blackpool Corp. v. Locker[29], with regard to the statutory elements of Notices. On a more prosaic level there surely ought to be fears about the difficulties of distinguishing between the statutory and non-statutory portions of Notices. The Commissioners have not adopted on a wide-scale any variations in typefaces to differentiate between the various elements,as occured in the Directives given to the N.E.B. and considered in Booth & Co.(International) Ltd. v. National Enterprise Board[30], which might be one solution to the problem. And as we shall see further below this problem of differentiation is a fundamental flaw in the current usage of Notices.

Where a tribunal has determined that a requirement of a specific Notice has statutory status and therefore prima facie the tribunal is bound to apply its demands, one strategy that a taxpayer can adopt is to challenge the vires of the relevant part of the Notice. But the chances of such a challenge being successful do not appear to be great because of the breadth of the language in which the Act and Orders delegate power as Robert Vulgar v. The Comms.[31] confirmed. There,as we have already learnt from Housden, s.30(3) 1972 Act provided,"Regulations under this section may make special provision for such taxable supplies by retailers of any goods or of any description of goods or of services or of any description of services as may be determined by or under the Regulations..". The 1972 Order then provided the details of the various schemes

would be set out in Notices,and once a taxpayer had elected to account under one of the schemes he must do so for at least one year. The appellant began to account under Scheme G,but after a few months he concluded that it required that he pay too much tax so he sought to transfer to another scheme. The Commissioners,in accordance with the Order,refused to allow him to transfer and he appealed on the basis that Scheme G was ultra vires the Act as it necessitated the payment of tax on exempt transactions. The tribunal dismissed his appeal noting,

"...it is inherent under a special scheme that the amount of tax payable thereunder by a retailer for an accounting period is most unlikely to be the same as would have been payable by him for that period if he had not adopted any special scheme and had accounted for tax on each and every supply made by him during that period. ... In our view,in default of special circumstances,a retailer cannot legally complain if the tax payable by him under a scheme is more than the sum which he otherwise would have had to pay,as he voluntarily elected to adopt the scheme."[32]

The reluctance of the tribunal to declare the scheme ultra vires may be explained both by the freedom of action granted to the Commissioners by s.30(3) and the relative diffidence towards decisions of the department exhibited by the tribunals during the early years of their existence.

Some members of the tribunals were more willing to subject the determinations of the Commissioners to a closer scrutiny as was highlighted by the majority decision in J H Corbitt (Numismatists) Ltd. v. The Comms.[33]. There the appellants had sought to account under the Margin Scheme (c/f Miller) which according to

A.3(5) V.A.T. (Works of Art etc.) Order 1972 did not apply,"...to any supply by a person unless he keeps such records and accounts as the Commissioners may specify in a Notice published by them for the purpose of this Order or may recognise as sufficient for those purposes." The department concluded that the appellants' books did not comply with either of these requirements and assessed them for tax under s.31(1). At the appeal the Commissioners argued that the tribunal did not have jurisdiction to review their discretion to approve acounts under the second limb of the above Article. The minority of the tribunal agreed with the Commissioners' view and relying on an earlier unreported decision concluded that Order,

"...confers upon the Commissioners an administrative discretion,which they and they alone can exercise,as to the evidence which they recognise as sufficient for the purpose of the concessionary scheme."[34]

But the majority disagreed:

"...once we have jurisdiction over the subject matter of the appeal,then we have power to go into all matters relating to the appeal de novo and to substitute our decision for that of the Commissioners. It is not,in the judgment of the majority,sufficient to say that merely because the quantum of an assessment as part of the chain of calculation by which it is reached involves a discretionary decision by the Commissioners,then such a discretionary decision cannot be reviewed by a tribunal..."[35].

Subsequently the Commissioners pursued the matter to the House of Lords where the majority took a very narrow view of the tribunals' jurisdiction and supported the decision of the minority above[36]. Lord Lane (with whom Lords Diplock,Simon and Scarman agreed) began by repeating the established perception of the response of

tribunals to the statutory aspects of Notices.

"It cannot be and is not disputed that the V.A.T. tribunal has no jurisdiction to review the requirements as to books and records which the Commissioners have laid down in the various appendices to the Blue Book [a colloquial name for Notices derived from the colour of their covers]. Their task on an appeal is confined on this aspect to an inquiry whether the trader's books and records in fact comply with the requirements of the Blue Book."[37]

He then went on to deal with the tribunals' jurisdiction regarding the second limb of A.3(5):

"the two halves of the article are part of the same system of approval or non approval of records,the first is set out in terms in the order,the second in the shape of a more flexible discetion. In neither case is there room for review by the tribunal except on the matters of fact as I have indicated."[38]

The underlying rationale of his Lordship's decision was revealed by his later comments that,

"if it had been intended to give a supervisory jurisdiction (like that asserted by the majority of the tribunal) one would have expected clear words to that effect in the 1972 Act. But there are no such words to be found. Section 40(1) sets out 9 specific headings under which an appeal may be brought and seems by inference to negative the existence of any general supervisory jurisdiction."[39]

The dissentient Lord Salmon took an antithetical attitude:

"for myself,I do not agree that such a case calls for what is sometimes referred to as supervisory jurisdiction in the High Court...it would be quite unnecessary and wrong for the Company to take the extravagant course of invoking the High Court's jurisdiction to review what the Commissioners had done since they have the statutory right of appealing to the tribunal against the Commissioner's decision under the second part of A.3(5)."[40]

The tone of the majority of their Lordships can have done little to inspire the confidence of those members of the tribunals who were disposed to subject the Commissioners' administrative and legislative powers

to a penetrating examination. Indeed the majority seemed almost to be influenced with a pre-Franksian desire to curtail the activities of tribunals and place the major responsibility for protecting citizens against the administration with the superior courts. However,Parliament has now intervened on behalf of V.A.T. Tribunals by enacting s.40(6) V.A.T. Act 1983 which effectively over-rules the majority's decision in Corbitt. This provides,"where an appeal under this section is against a decision of the Commissioners which depended upon a prior decision taken by them in relation to the appellant,the fact that the prior decision is not within subsection (1) above shall not prevent the tribunal from allowing the appeal on the ground that it would have allowed an appeal against the prior decision." We shall now have to await any possible judicial interpretation of this subsection to discover if the senior judiciary have taken the hint from Parliament concerning the authority of these tribunals.

To summarise the response of the tribunals to those parts of Notices which they determine to be the product of legislative powers (and Miller shows the potential complexity of this task-involving the construction of primary and secondary legislation together with assorted departmental publications),unless the taxpayer can establish the ultra vires nature of these provisions (a virtually impossible eventuality as Vulgar showed),then the tribunal are obliged to apply the provisions of the Notice (as that part of Lord Lane's opinion in Corbitt

which was not over-ruled by Parliament confirmed). Therefore,let us now examine whether a similar reaction occurs in relation to Notices which are not the product of legislative powers.

b. Public Notices (or parts of them) issued as a consequence of administrative responsibilities.

The major portions of most Notices do not owe their origins to legislative powers conferred upon the Commisioners,but instead have their antecedents in the administrative duties of the department. To clarify the responses of tribunals to these Notices the latter will be sub-divided into two categories which we have used previously and which are recognised by the Commissioners and the tribunals-they are interpretative guidance and policy guidance.

1. Interpretative Guidance

The first issue we must address is the basis upon which the Commissioners seek to justify their promulgation of this type of Notices. A direct answer to this question was provided in the case of Grimsby and District Sunday Football League v. The Comms.[41]. There the tribunal endorsed the departments' view that,

"the Commissioners of Customs and Excise,who are charged with the care and management of V.A.T. are entitled to interpret the V.A.T. legislation and to issue guidance,by means of Public Notices or otherwise,on their views on the liability to the tax of particular supplies or classes of supply of goods or services. In the absence of contrary judgments by the V.A.T. Tribunals or higher courts,they are entitled to enforce payment of tax in accordance with their views."[42]

So the Commissioners believe that their executive responsibility of administering the tax entitles them to develop relevant interpretative guidance. This should

not come as a surprise to us in the light of the earlier research discussed in this work. After all, we noted Professor Davis' opinion that the interpretation of legislation was at the heart of the administrative process. What is more novel about the above statement is that the Commissioners were expressly acknowledging the contingent status in law of their interpretative guidance. Furthermore, they were accepting that it was for the tribunals,in addition to superior courts,to rule on the validity of the guidance. Therefore,it seems likely that in the light of the expense and procedural difficulties involved in obtaining a judicial determination of taxpayers' legal rights, tribunals would be the major forum for decisions upon the propriety of these Notices. But before we examine whether this prediction is true we must briefly consider how the parties to tribunal proceedings seek to use such Notices in their arguments regarding the interpretation of the statutory requirements of V.A.T..

Although we might expect the Commissioners to be arguing that their Notices contain the correct interpretation of the law and taxpayers to be disputing that view,the reports do not reveal such a neat picture. In Mansell Youell Developments Ltd. v. The Comms.[43] the appellants purchased land,obtained planning permission for it, then a related company built houses on the land and finally that company sold the houses whilst the appellants sold the land on which the dwellings stood. The appellants claimed that they were in substance

supplying a zero rated supply,namely "the construction of a building" under Group 8 Schedule 4 1972 Act. The Commissioners disputed this arguing that,as their Notice 708 stated, "construction" required a contractual relationship between developer and builder which did not exist in this case. The tribunal agreed with the Commissioners' interpretation of the Act. So in that appeal the Commissioners were using their guidance as we would have predicted. However,in Astric Products Ltd. v. The Comms.[44] the appellants claimed that their equipment came within a class of goods said to be exceptions to Schedule 7 Finance (No.2) Act 1975 by Notice 742. But the Commissioners submitted that,

"whether or not the Dry-Bed equipment fell within Item 1 of Group 1 was a pure question of construction of the words of the statute,as to which Notice 742 could not help the Appellant. This was only intended as a general guide and it in no way constituted the law."[45]

Again the tribunal accepted the Commissioners' interpretation, but suggested they consider using their legislative powers to exempt medical goods like these. There the Commissioners were seeking to diminish the stature of their own interpretative guidance in a situation where it was contrary to their line of argument before the tribunal! They have even gone so far as to submit that their guidance may be erroneous, as happened in The B.B.C. v. The Comms.[46]. Section 3(1) 1972 Act entitled taxpayers to reclaim tax paid by them on purchases for their business. Notice 701 stated that subject to exceptions,"where an employee pays expenses,including V.A.T.,that tax can be treated as

input tax by the employer if the employee has been reimbursed for his expenditure." The appellants paid a subsistence allowance for their employees working away from home that was based on their seniority, and from 1973 an additional amount for any V.A.T. incurred. The Commissioners refused to allow the additional sums to be reclaimed as input tax arguing (a)there had been no supply to the B.B.C. as required by s.3(1) and (b) if "the present case complies with the conditions set out in the Notice to enable the Corporation to treat this tax as input tax,then the Notice is at variance with the law and the Commissioners are not bound by it."[47] The tribunal upheld the Commissioners' first submission. Nevertheless the second ground revealed the Commissioners expressly acknowledging that their interpretative guidance may not always be accurate.

Conversely,and this is already to some extent apparent from the cases above,taxpayers have argued that Notices specify the correct view of the law. For example in Keith Brian Kennell v. The Comms. the appellant sought to obtain repayments of tax paid on materials and services used in the construction of his home. Section 3 Finance Act 1973 provided that, "...a person constructing a dwelling,lawfully and otherwise than in the course of a business carried on by him..." could reclaim such tax. The appellant claimed to come within that section by virtue of Notice 708 in which the Commissioners defined such an individual as one who "exercises some measure of control over its

construction". The tribunal applied that definition to the appellant's circumstances and decided in his favour.

Therefore, the practice of parties in using interpretative guidance before the tribunals does not demonstrate a symmetrical pattern, with the Commissioners always seeking tribunal approval and application of their Notices, and taxpayers ceaselessly challenging these provisions. Instead both groups appear to invoke such Notices on a tactical basis,citing them when they consider they support their current line of argument and trying to distinguish or undermine them when they stand in their way. However,the fact that both groups make regular references to these provisions is yet another demonstration of their significance in state/citizen relations.

To turn now to the major themes in the tribunals' response to these Notices,the basic reaction of tribunals throughout the period of research was to affirm that they were not bound by the interpretations contained within these pieces of guidance. By continually articulating this view the tribunals were clearly signalling their independence from the department. The strongest exposition of this standpoint occurred in ~~Normal Motor Factors Ltd.~~ v. ~~The Comms.~~[48] where the appellants sought to rely upon Notice 700 to entitle them to reclaim tax paid by their clients on repair work carried out under the appellants' guarantees. The tribunal replied,

"moreover we think it cannot too often be repeated that these tribunals will not use Public Notices,which do not pretend to have any legal weight,as aids to the interpretation of the Finance Act 1972 and any statutes directed to be construed as one therewith."[49]

Consequently that tribunal was saying that in its opinion tribunals would not even consider utilizing Notices as an element in their construction of the statutory demands of V.A.T.. However,most tribunals have taken a somewhat softer line by confirming their freedom to depart from Notices, but also considering the interpretations put forward in them. For example in Darlington Borough Council v. The Comms.[50] the appellants claimed that their provision of an abattoir and related services should be zero rated as a consequence of the interpretations provided in Notice 749. The tribunal,whilst holding that these provisions did not support the appellants' contentions,stated,

"the views expressed in this and similar Public Notices issued by the Commissioners are not,nor are they intended to be,declaratory of the statutory provisions and express no more than the Commissioners' opinion from time to time as to the interpretation of the Finance Act 1972 and various orders and regulations made thereunder. Such opinions are not binding upon these tribunals:nevertheless we should say at this point that having considered the passages in Notice 749 to which we were referred in argument,these passages seem to us adequately and accurately to explain the legal position..."[51].

And in one decision the tribunal expressly adopted the interpretation contained in a Notice. The appellant in Raymond Walle v. The Comms.[52] contested the Commissioners' decision that the construction of a summerhouse in his garden was not a "building" for the purpose of being zero rated under Schedule 4 1972 Act. He relied upon Notice 708 on which the tribunal

commented,

"this passage does not,of course,have any binding effect in law and in our view it broadly speaking succeeds in its aim as being a useful guide for traders and others. It does its best to do,in order to help the general public,what judges have in the past refrained from doing,namely to define the term "building". On page 6 there is an actual reference to summerhouses,and the passage suggests that where such summerhouses...are not permanently attatched to a concrete base they should be standard rated and not zero rated. We find this to be a sensible suggestion."[53]

They then went on to apply that test to the appellants' summerhouse and concluded that as it satisfied the criteria the appeal should be allowed. Thereby they were demonstrating that whilst they were not obliged to implement the department's interpretative guidance they would endorse those provisions which,in their opinion, correctly amplified the statutory requirements.

Conversely,where the tribunals did not agree with the department's Notices there has been a consistent trend in their decisions indicating a distinct reluctance to openly condemn the erroneous provisions. In En-tout-cas Ltd. v. The Comms.[54] the appellants were specialists in the construction of sports facilities. During 1973 the Commissioners produced a supplementary Notice,to 708 dealing with the construction industry, which stated,"supplies in the course of the construction of a hard suface tennis court (or swimming pool) which forms part of,or stands in the grounds of,a school,university,hospital or municipal recreation area,a club,hotel,holiday camp or similar establishment are zero rated." Applying this Notice the Commissioners assessed the appellants for tax at the standard rate on

the construction of a tennis court and pool built in the grounds of private homes. The appellants disputed the assessment arguing that such works came within Group 8 Schedule 4 1972 Act irrespective of where they took place. The tribunal agreed with that submission:

"...we have come to the conclusion that the distinction sought to be drawn by the Commissioners between a work executed for a "public" client and a work executed for a "private" client is untenable. We are unable to accept [the Commissioners' Counsel's] argument that some underlying principle of social merit runs through Schedule 4... Accordingly,in so far as the Commissioners' decision depends on the distinction set out in the Notice I have read,we are of opinion that it is wrong."[55]

Therefore,whilst the tribunal were willing to reverse the Commissioners' decision regarding the particular assessments; they refrained from condemning the departments unsubtle attempt to alter Parliaments intention through the guise of "interpretation",or even directly criticising the language of the Notice. Likewise in the B.B.C. case,where the Commissioners suggested that their Notice might be erroneous,the tribunal avoided castigating the provision,

"...nor do we think it is necessary to express any view about the validity of the Public Notice,or as to the extent,if any,to which the Commissioners would be bound by it if it were invalid,because in our view [the Commissioners' Counsel's]first submission is correct."[56]

Also in Guardia Shutters Ltd. v. The Comms.[57] where a manufacturer of a substitute for secondary double glazing successfully challenged the Commisioners' view,expressed in Notice 715,that the installation of double glazing amounted to an "alteration" of a building and was therefore chargeable at zero rate,the tribunal

made no adverse comments as to the validity of the Notice.

However,more recently the decision in Stirlings (Glasgow) Ltd. v. The Comms.[58] reflects a sharp contrast with some of the earlier cases (particulary B.B.C. with which it has many legal similarities). Notice 700 provided,"if your employees are reimbursed for the cost of petrol they buy for business use by mileage allowances based on the actual distances they travel on business journeys you can count as input tax the V.A.T. fraction of the allowances...". The appellants paid their travellers a fixed weekly petrol allowance but still claimed input tax in relation to it. The Commissioners refused to accept such a claim. Before the tribunal the Commissioners argued,inter alia,that there had been no supply of the petrol to the appellants as required by s.3 1972 Act. The tribunal accepted the Commissioners' proposition but also went on to express their,

"...doubts in relation to the operation of paragraph 4 [of the Notice]... At best these provisions leave the reader in doubt on the basic requirement that there must be a supply to the taxable person,as required by s.3(3)(a);at worst these provisions are inconsistent with s.3(3)(a)... We therefore feel it would be unsafe to apply the provisions of paragraph 4,in respect that it seems to involve concessions by the Respondents which are not warranted by the terms of the Act."[59]

Hence in an inverse response to the approach of the tribunal in B.B.C. this tribunal went out of its way to highlight the defects,as it saw them,in the Notice, thereby alerting both the Commissioners and other taxpayers to the potential dangers of relying upon that

Notice as an accurate exposition of the law.

The above cases indicate that the tribunals have been rather diffident in condemning those parts of Notices which they consider contain erroneous interpretations. This suggests that they have placed greater emphasis on the particular dispute before them rather than its wider precedential value in regard to other taxpayers faced with analogous circumstances and purportedly subject to the same Notice (eg. all constructers of sports facilities or installers of double glazing). This response of the tribunals may have been encouraged in part by their immaturity compared with the heritage and experience of the Commissioners and subsequently by the unsympathetic attitude towards their powers displayed by the House of Lords in Corbitt. But whatever its origins if it persists (c/f the altered approach in Stirlings) such an attitude represents a lacuna in the response of these tribunals towards interpretative guidance.

The tribunals have also had to deal with appeals where the taxpayer has sought to assert that this type of Notice has a legal significance going beyond a persuasive value in the interpretation of statutory language. Two forms of legal reliance upon these Notices have been proposed, (a) where the taxpayer has sought the restitution of monies paid to the department and (b) where he has claimed that the department are estopped from denying him a tax advantage as a consequence of a statement contained in a Notice. Looking first at those

cases in category (a),the appeal of the Grimsby and District Sunday Football League,which has already been encountered,is the prime example of this utilisation of Notices. Schedule 5 1972 Act provided that,"the grant,assignment or surrender of any interest in or right over land or of any licence to occupy land..." was exempt from V.A.T.. In Notice 749 issued in 1972 the department stated that the letting of football pitches was exempt under the above Schedule. Then a few months later they reversed their view. Relying on the latter Notice the appellants paid tax on their hiring of pitches for the next eight years. However,after a tribunal ruling that such rentals were indeed exempt the appellants sought the restitution of the tax they had paid as a consequence of relying upon the latter Notice. The tribunal accepted the Commissioners' argument that it did not have jurisdiction to hear an appeal based on such a claim because following the earlier tribunal decision of Roger Kyffin v. The Comms.[60],

"...to order recovery of money paid voluntarily under a mistake of law could not be within the jurisdiction of a V.A.T. tribunal:the proper forum would be the High Court in proceedings asking for a judicial review of the disputed decision of the Commissioners."[61]

This application of Kyffin does not appear to be entirely warranted because there the tribunal was determining whether it should exercise its discretion to allow an appeal,based upon a mistake of law,lodged outside of the 30 day notification period. The former tribunal did not unequivocally deny that it had jurisdiction over such claims,but in the light of the

legal principle that,

"there is no general right of recovery of money paid voluntarily under a mistake of law. And a payment of duty not exigible is a voluntary payment (see William Whiteley Ltd. v. R. [1909] 26 T.L.R. 19. ... Under these circumstances the tribunal considers that the exercise of a discretion to extend time under Rule 18 would be a supererogatory exercise which would produce no material end result,and this is a cogent reason for refusing to exercise such discretion."[62]

However,if we accept that even if a tribunal were to appraise itself of a claim analogous to that advanced in Grimsby it would fail as a consequence of this general principle of law,we are faced with an issue which has repercussions far beyond this tribunal system and potentially encompasses all individuals who act on the basis of interpretative guidance. Because as Birks confirms the current position in the law of restitution is that,

"...those who pay by mistake of law,or even under no mistake at all but simply because they despair of making their view prevail against the position taken by the bureaucratic machine,must on this view be said to have no hope whatever of obtaining restitution."[63]

And as it is apparent from the above tribunal decisions that individuals who rely on interpretative guidance which is later declared to be erroneous are likely to be treated as having acted "in mistake of law", they are consequently not able to reclaim any monies paid in accordance with the terms of the guidance. This application of the principles of restitution seriously disadvantages those individuals who rely upon this form of guidance in their relations with departments.

Birks has criticised the assessment of public bodies liability to restitution under the same principles as

those applicable to private individuals due to the fact,that in his opinion,they fail to give sufficient weight to the constitutional norm which,"outlaws all levies taken without the consent of Parliament,not merely levies obtained by unlawful threats."[64] Craig has also attacked the existing rules governing restitution and proposes,

"given the complexity of much modern legislation and the greater ability of the public body to interpret and understand it an argument can be made that in certain areas at least the "risk"[65] of a misconstruction should lie with the public body."

We may suggest that where a department promulgates interpretative guidance it should be held to have assumed the risk and associated burdens of an independent judicial body subsequently declaring that guidance to be wrong and individuals seeking the repayment of monies paid in reliance upon those provisions. After all, the department is in the best position to know whether it has given enough thought to its guidance and if it sincerely believes the interpretation accords with the legislator's intent. Unless the department is satisfied of these matters it should not be issuing the guidance. A critic of this view might,in the context of V.A.T.,point to the availability of tribunal determinations for taxpayers who are uncertain as to the accuracy of departmental Notices. However,the burdens for a lay person seeking to challenge an interpretation of the Commissioners even before a tribunal should not be minimised,both in terms of the time and effort involved and the cost where legal

representation is obtained.[65*]

The second category of reliance upon these Notices is where the taxpayer claims that the department are estopped from denying him a tax advantage outlined in such provisions. In the Normal Motor Factors case the appellants tried to argue that the Commissioners were estopped from refusing to allow them to reclaim V.A.T., paid by their customers,as input tax because of Notice 700. This was a somewhat surprising claim because the relevant part of the Notice stated the taxpayer was not entitled,"to deduct the tax on another person's inputs even if he paid for them"! But after observing that the Notice contained the following caveat on its inside cover,"the law concerning V.A.T. is in the Finance Act 1972 and orders and regulations made under the Act. Nothing in this Notice overrides the legal requirements.",the tribunal concluded,

"...that,in our judgment,goes far to prevent any estoppel from arising even if misleading statements should happen to occur in the text. But we have examined the relevant paragraph...and nowhere can we find anything which might,in our judgment,have led the Appellant into thinking that input tax was properly deductible in the circumstances of this case."[66]

So the tribunal appeared to be implying that the caveat,which most Notices contain at their beginning,was a suitable antidote to any asserted estoppel.

Furthermore the later case of G.U.S. Merchandise Corp. Ltd. v. The Comms.[67] has seemingly given the Commissioners an even wider immunity from claims of estoppel. The appellants provided free items,such as teaspoons,to attract and retain customers. They

discussed with officers of the department whether these items would be chargeable to tax and the latter said they would not be chargeable. Three years later the Commissioners sought to assess the appellants for tax on these items. Before the tribunal the appellants argued,inter alia,that the Commissioners were estopped from now charging V.A.T.. After citing several judicial decisions culminating in Southend-on-Sea Corp. v. Hodgson (Wickford) Ltd.[68],the tribunal declared,

"in our judgment,however,having regard to the authorities to which we have referred,and to the mandatory nature of ss.1 and 2 [1972 Act],an estoppel cannot lie against their provisions. Moreover,having regard to the passage from the judgment of Lord Parker CJ quoted above,we have reached the conclusion that an estoppel cannot lie so as to hinder the exercise of a statutory discretion... so that no estoppel can lie against the Commisioners."[69]

Consequently,in the eyes of the tribunal,the statutory framework of V.A.T. provided the Commissioners with a general protection against claims of estoppel. The courts were not given an opportunity to consider this point because by the time this case reached the Court of Appeal the appellants had dropped all mention of estoppel as a ground of appeal.[70] Therefore,pending such an examination the Commissioners have protection against similar claims irrespective of whether the particular Notice contained a caveat or not. Whether an appellant would fare better before either the tribunals or the courts by basing his demand,that the department should observe their published statements,on the public law concept of fairness (c/f Chapter Six for a detailed analysis of the judicial application of this concept to

administrative guidance) rather than estoppel is a moot point.

To summarise the above responses towards Public Notices, the reports affirm the fact that the tribunals are the major forum for determining the legal effects of these provisions; particularly when contrasted with the limited judicial consideration of similar issues (there were only three court decisions involving Notices during the decade of the research period[71]). Furthermore,these decisions go far towards establishing the independence of the tribunals from the department. Not only because of their often repeated view that they did not consider themselves bound by the Commissioners' interpretations contained within the Notices (eg.Darlington Borough Council),but also because of their amenability to persuasion,by taxpayers,that the Commissioners' views were erroneous (eg. En-tout-cas and Guardia Shutters). However,this response demonstrated the weakness,from the taxpayer's perspective,that the tribunals appeared relatively unconcerned about the universal impact of their decisions,as was manifest in their reluctance directly to condemn those portions of Notices containing wrong interpretations. The potential consequences of this were that other taxpayers were not alerted to the dangers of relying upon those passages and the Commissioners were subjected to less pressure to amend their Notices. Secondly,through the importation of common law principles (notably those governing restitution and the inapplicability of estoppel to

statutory powers) the tribunals refused to accede to the contentions of taxpayers that these Notices should be treated as having some substantive legal effects (Normal Motor Factors and Grimsby Football League). Therefore, subject perhaps to the export of the judicial concept of fairness to this tribunal system,taxpayers seem destined to be more successful in challenging the content of Notices before the tribunals,than in having them imbued with legal consequences extending beyond a mere endorsement of the accuracy of the interpretations contained within them.

2. Policy Guidance

The final (and least numerous though equally interesting) form of Notices are those which express the Commissioners' views on how they will exercise various extra-statutory discretionary powers which they have assumed. These Notices,or parts of Notices,do not clearly state that their provisions are in law extra-statutory concessions, nor do they attempt to justify this administrative practice. Consequently taxpayers may be unaware of the status of these Notices when they invoke the terms of these provisions before tribunals. If so,as we shall see below,they may be in for an unpleasant shock as a result of the tribunal classifying the Notice as a piece of guidance of this type.

In David Wickens Properties Ltd. v. The Comms.[72] the appellant argued that his reconstruction of a house should be treated as a zero-rated transaction because Notice 708 stated,"a person will also be regarded as a

person constructing a building,and therefore able to make a zero-rated grant of a major interest in that building under the provisions of Item 1 of Group 8 [1972 Act],if he carries out or commissions a work of substantial reconstruction to such a building." The Commisioners disputed that claim as they argued,"...paragraph 20 is merely an extra-statutory concession.Accordingly the company is not entitled to rely thereon in these proceedings and this tribunal cannot go into this appeal,in so far as it is based on such paragraph." After determining as a matter of statutory interpretation that acts of reconstruction did not fall within the above Schedule, the tribunal responded to the Commisioners' argument in the following terms,

"in our opinion it is most undesirable that a tax on consumption,such as V.A.T.,should be administered on the basis of extra-statutory concessions which are not advertised as such. Decisions of the Commissioners with regard to an extra-statutory concession cannot be challenged in the courts. A taxpayer has little or no warning of the trap into which he can fall if an extra-statutory concession is not clearly stated to be purely a matter which the Commissioners alone can administer and decide."[73]

So the tribunal impliedly agreed with the Commissioners' assertion that policy guidance elaborating extra-statutory concessions could not be examined by the tribunals.

Another tribunal in ~~Cando 70~~ v. ~~The Comms.~~[74] expressly concluded that it had no jurisdiction to consider a Notice defining such a concession. Section 3(1) Finance Act 1975 had authorised the registration of self-build housing groups for V.A.T.,thereby enabling

them to reclaim tax paid on their building materials etc.. Without legislative approval the Commissioners extended a similar privilege to groups constructing other new buildings in Notice SHP 1. The appellants were converting their church into a combined church and social centre and sought registration under the terms of the Notice. The Commissioners refused because the appellants were not constructing a new building as required by the terms of their Notice. The tribunal's judgment gave an indication of the scale of reliance upon such Notices when it disclosed that nationally 600 groups had sought registration under this single Notice,which goes some way towards demonstrating the significance of such concessions within the tax system. The tribunal then concluded,

"...we start from the clear conclusion that there is no statutory basis for SHP 1...the whole circumstances of this appeal seem to the tribunal to add force to what has been said by the courts in many previous cases,namely that it is essential that persons should be taxed by statute and not untaxed by extra-statutory concession. ... If we have any such jurisdiction we think it can be only under the general provisions of s.40(1)(a)[1972 Act];and under those provisions we are confined to consideration of what is contained in the Act itself and we cannot assume jurisdiction over the extra-statutory provisions of SHP 1."[75]

Therefore,the tribunal was construing its enumerated grounds of jurisdiction as disabling it from examining these Notices because their non-statutory basis meant that they fell outside the ambit of the specified heads of appeal.

From the above cases,it seems clear that the tribunals consider that their limited statutory

jurisdiction prevents them from reviewing,let alone reconsidering on a de novo basis,the application of Notices detailing extra-statutory concessions. But the position of the dissatisfied taxpayer may not be as vulnerable to the whim of the Commissioners as the tribunal in Wickens believed it to be. This is because as earlier chapters of this work have revealed other agencies are available to scrutinise the Commissioners' utilisation of such Notices. For example,following the House of Lords' decision in R. v. Inland Revenue Commissioners,ex p. Preston[76], there is no a priori reason why the courts should not hold the Customs and Excise Commissioners to be legally bound by these Notices (c/f Chapter Six). Furthermore,in the realms of actual experience,the P.C.A. has investigated the Commissioners' use of extra-statutory concessions in the assessment of V.A.T. to ensure that maladministration has not been present[77](and c/f Chapter Five).

CONCLUSIONS

To summarise the responses of the tribunals to Public Notices we can state that they have differed fundamentally according to the type of guidance contained within the particular Notice. Those elements of Notices establishing interpretative guidance were subjected to the most severe scrutiny by the tribunals, who asserted their superiority over the Commissioners in determining the correct interpretation of the legislative foundations of V.A.T.. The tribunals

reinforced this claim both by regularly repeating the fact that they were not bound by these parts of Notices (eg.Darlington) and by their willingness to approve interpretations proposed by taxpayers (eg.Guardia Shutters). Even the Commissioners openly acknowledged the dominant role of the tribunals in ruling on the accuracy of their interpretative guidance in Grimsby. Consequently this reaction in essence replicates on a more limited scale the fiercely defended constitutional role of the courts to provide the ultimate and most authoritative interpretation of the legislative will. Furthermore,the tribunals have maintained this stance even in the face of potential legislative reversal,because as Mainprice concluded,"on many occasions when the Commissioners have suffered a defeat in a V.A.T. Tribunal they have used the statutory instrument procedure to alter the law so their interpretation is restored,"[78] which may be yet another reason why historically the tribunals have been rather reluctant to directly criticise Notices containing erroneous interpretations.

As for the Notices containing policy guidance relating to the Commissioners' assumed extra-statutory concessions, the reports disclosed the tribunals construing their limited jurisdiction as debarring them from scrutinising the department's application of this form of guidance. Such a response is of general significance to the whole of this work because it again provides evidence of the link between the legal nature

of a rules regime regulating a governmental programme and the accessibility of the various grievance handling agencies. As we discovered in our research on student grants, the choice of a regime of administrative guidance in Scotland had the effect of discouraging judicial challenges by aggrieved applicants,whilst the utilisation of delegated legislation in England and Wales facilitated the invocation of the judiciary eg. R. v. Barnet L.B.C.,ex p.Shah[79]. Here we learn that the use of the different forms of guidance within one departmental programme can have an analogous effect upon the availability of remedial agencies. For example whilst the tribunals have been unwilling to consider policy guidance (eg.in Wickens) the P.C.A. has investigated its application[80],whereas an inverse response has occurred in relation to interpretative guidance, with the tribunals determining its accuracy and the P.C.A. expressly refusing to enter into a consideration of the Commissioners' interpretation of the law[81]. Therefore,once more we see the importance of administrative guidance not merely as an expression of citizens' entitlements in the eyes of the administration, but also as a weighty factor affecting the competence of remedial agencies to intervene on behalf of citizens.

The reports did not divulge any case where a tribunal encountered procedural guidance. Presumably the absence of this form of guidance from the contents of Notices is explicable because the Commissioners use the

latter to express their opinion (whether derived from statutory or administrative powers) regarding the rights and duties of taxpayers and not to specify the procedural obligations of their officers.

When we evaluate the above responses in terms of how the tribunals draw the strategic balance between the interests of the department and taxpayers, they may appear somewhat diffident in their willingness to confront the department when compared with the boldest decisions of the courts (eg. in R. v. S.S.H.D.,ex p. Khan[82] and A.G. for Hong Kong v. Shiu[83]). This conclusion may be supported by their reluctance to directly criticise erroneous interpretations in Notices (eg.En-tout-cas); the refusal to imbue such Notices with substantive legal effects (eg.Normal Motor); and their restrictive construction of the limits of their jurisdiction to prohibit them from examining policy guidance (eg.Cando). However,to a large extent these decisions in favour of the department have been induced by the judicial supremacy over the tribunals manifested in the right of appeal on a point of law from a tribunal to the High Court. This has ensured that the tribunals implement common law principles (as they did with regard to restitution in Normal Motor) and remain within their jurisdiction (which was defined restrictively by the majority of the House of Lords in Corbitt). Neither of these considerations can be said to have provided the tribunals with any judicial encouragement to magnify the intensity of their scrutiny of the Commissioners'

actions.

As a final topic of interest we can contemplate what our knowledge of the administration and adjudication of V.A.T. has contributed to our general concern with the public's awareness of the existence and content of administrative guidance affecting them. As we noted at the beginning of this chapter Public Notices represent an almost paradigm example of accessible and open guidance. However,as this research has revealed,they suffer from one basic flaw in that the Commissioners' have failed to adequately distinguish between the different forms of guidance contained within the Notices. Although some attempts have been made to differentiate between interpretative guidance and statutory based obligations (eg.Appendix A of Notice 712 on the Margin Scheme for Antiques utilises bold type for statutory requirements and light type for interpretations),they are the exception (eg.paragraph 18 of the same Notice does not state that its demands have statutory authority). But no effort whatever has been applied to clarifying the distinction between parts of Notices containing interpretative guidance and those establishing policy guidance towards extra-statutory concessions. For example,there is nothing to distinguish the language of paragraph 19 of Notice 708 on the Construction Industry being interpretative guidance (as was contended by the Commissioners in Mansell Youell) and paragraph 20 defining an extra-statutory concesion (as the Commissioners argued in Wickens). Moreover

Notice SHP 10,which is the successor to the Notice elaborating the concession for voluntary self-build groups that was at the heart of the appeal in Cando,still makes no reference to its nature and is positively misleading in its explanation of appellate rights in the light of the above tribunal's decision that it had no jurisdiction over such guidance!

The need for clarity in the separation of the different types of guidance is essential if the citizen is to be able to effectively plan his response to those provisions which he believes to be adverse to his interests. Because as this and previous chapters have shown,without such information he cannot realistically consider (a) the grievance handling agencies which have competence over the particular piece of guidance (see the above discussion on the unwillingness of V.A.T. tribunals compared with the P.C.A. to examine policy guidance) and (b) the types of arguments he can deploy against the relevant piece of guidance (ie.it would be permissible to urge a tribunal to substitute its view for that of the Commissioners regarding a piece of interpretative guidance, but useless to deploy such a contention towards that part of a Notice having statutory status). Consequently the lesson we must learn from our study of V.A.T. is that it is not sufficient merely to demand the publication of administrative guidance,one must also stipulate that the promulgators clearly identify the class of guidance to which the specific provision belongs.

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07 Robert Baldwin,Regulating the Airlines,263. And see his earlier articles,"A British Regulatory Agency and the Skytrain Decision",[1978] P.L. 57;"A Quango Unleashed:The Abolition of Policy Guidance in Civil Aviation Licensing",58 Public Administration 287.

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09 There are additional important tribunals which are not within the present remit of the Council on Tribunals.See Patrick Birkinshaw,"Decision-making and its Control in the Administrative Process-An Overview" in P McAuslan & J F McEldowney eds., Law,Legitimacy and the Constitution.

10 See M Adler & A W Bradley eds.,Justice,Discretion and Poverty and M Adler & S Asquith eds.,Discretion and Welfare.

11 Stephen Oliver,"Tax Tribunal Reports",[1980] B.T.R. 229.

12 According to the Index to Legal Periodicals in June 1986.

13 Barry Pinson & John Gardiner,Pinson on Revenue Law, 14th ed. 617.

14 Currently businesses with a taxable turnover exceeding £19,500 p.a. are required to register for V.A.T. see The V.A.T. (Increase of Registration Limits) Order 1985,1985/433.

15 H H Mainprice,"V.A.T. After 3 Years",[1976] B.T.R. 230.

16 Op. cit. 631.

17 "Appeals to V.A.T. Tribunals" Explanatory Leaflet issued by the President of V.A.T. Tribunals,12.

18 See cases C316/68 H C 129 (1968-69) and C209/G H C 290 (1972-73).

19 Notice 712 p.3.

20 Notice 708 p.3.

21 Leaflet SHP 10 p.2.

22 But note the P.C.A.'s investigations into the department's conduct which reveal their additional use of unpublished guidance eg. Cases C435/T 3rd. Report 1974-75 Session and C469/V 5th.Report 1975 -76 Session. And c/f the similarity with the S.E.D.'s administration of student grants with extensive internal guidance elaborating upon the published booklet.

23 Searches conducted on the 15/7/1986. In one search of the U.K. tax cases file the terms "V.A.T. and Public Notice" produced 28 reported cases containing these terms,of which 14 had been noted during our manual search and the remainder discarded as not being relevant. A second search for "V.A.T. and Extra Statutory Concession" produced 3 cases,2 of which we had already discovered and one which fell outside of our area of study.
24 (1981) V.A.T.T.R. 217.
25 Ibid. 219.
26 (1977) V.A.T.T.R. 241.
27 Ibid. 251.
28 Op. cit. 231.
29 [1948] 1 K B 349.
30 [1978] 3 All E R 624.
31 (1976) V.A.T.T.R. 197. Note the Court of Appeal in Henery Moss of London Ltd. v. Customs and Excise Comms. [1981] 2 All E R 86 has also discouraged challenges to the vires of these provisions by declaring that taxpayers cannot appeal on a point of law against the decision of a V.A.T. tribunal upholding such a Notice,but must instead apply under Ord. 53. Bradley has criticised that decision ("Applications for Judicial Review" [1981] P.L. 476),but the judiciary have yet to reconsider their determination.
32 Ibid. 203-204.
33 (1977) V.A.T.T.R. 194.
34 Ibid. 201.
35 Ibid. 202.
36 Customs & Excise Comms. v. J H Corbitt (Numismatists) Ltd. [1980] 2 All E R 72.
37 Ibid. 79.
38 Loc. cit. .
39 Ibid. 80.
40 Ibid. 75.
41 (1982) V.A.T.T.R. 210.
42 Ibid. 212.
43 (1978) V.A.T.T.R. 1.
44 (1976) V.A.T.T.R. 17.
45 Ibid. 21.
46 (1974) V.A.T.T.R. 100.
47 Ibid. 107.
48 (1978) V.A.T.T.R. 20.
49 Ibid. 25.
50 (1980) V.A.T.T.R. 120.
51 Ibid. 126.
52 (1976) V.A.T.T.R. 101.
53 Ibid. 106.
54 (1973) V.A.T.T.R. 101.
55 Ibid. 108-109.
56 Op. cit. 107.
57 (1980) V.A.T.T.R. 130.
58 (1982) V.A.T.T.R. 116.
59 Ibid. 119.
60 (1978) V.A.T.T.R. 175.
61 Op. cit. 218.
62 Op. cit. 177.

63 Peter Birks, An Introduction to the Law of Restitution, 295.
64 P B H Birks, "Restitution From Public Bodies", 33 C.L.P. 196.
65 P P Craig, "Compensation in Public Law", 96 L.Q.R. 434.
65* Eg. in the Guardia Shutters case the appellants expended between £500-700 on the legal costs of challenging the department's zero-rating of double glazing.
66 Op. cit. 25.
67 (1978) V.A.T.T.R. 28.
68 [1961] 2 All E R 46.
69 Op. cit. 53.
70 [1981] 1 W L R 1309.
71 According to the above Lexis search they were Corbitt Op. cit. and ACT Construction Ltd. v. C & E Comms. [1981] 1 All E R 324. See also Henry Moss of London Ltd. v. Customs and Excise Comms. [1981] 2 All E R 86.
72 (1982) V.A.T.T.R. 143.
73 Ibid. 155.
74 (1978) V.A.T.T.R. 211.
75 Ibid. 213-214.
76 [1985] 2 W L R 836.
77 Eg. C.686/J and C.25/V 6th Report 1974-75.
78 Op. cit. 234.
79 [1983] 2 W L R 16 and see Chapter 3 for further details.
80 Op. cit. at 77 above.
81 C.51/J 3rd. Report for Session 1974-75.
82 [1985] 1 All E R 40.
83 [1983] 2 W L R 735.

CHAPTER EIGHT

CONCLUSIONS

Introduction

In this final chapter we shall engage in a retrospective overview of the research contained within the earlier chapters. Our purpose will not be simply to repeat the specific findings concerning the organisational and legal attributes of administrative guidance which have already been discussed in the separate parts of this thesis. We shall concentrate upon comparing the degree of harmony and/or dissonance in the responses of the various grievance handling agencies to these provisions;and their compatibility with the organisational features of departmental usage of guidance. On the basis of these conclusions proposals for the future legal treatment of administrative guidance will be suggested.

In the light of this research we can now restate,with the benefit of increased empirical evidence and understanding,our belief in the importance for contemporary public law of the creation and usage of administrative guidance by central government departments. This is because of the fundamental significance of these provisions in the departmental assessment of citizens' entitlements and liabilities (eg. the determination of liability to V.A.T.[1];the

circumstances in which prisoners can obtain legal advice[2];and the granting of student awards[3]),which has inevitably necessitated the development of the jurisprudence of the different grievance handling agencies to take account of guidance (eg. the judicial adaptation of the non-fettering principle to policy guidance regulated decision-making in British Oxygen[4]; the P.C.A.'s evolution of the Sachsenhausen doctrine[5];and the supremacy over interpretative guidance asserted by V.A.T. tribunals[6]). Furthermore our belief is bolstered by the increasing level of practical and academic legal interest which has been exhibited in guidance during the currency of this research project. The judiciary have,at last,begun to grapple with the legal implications of guidance in major cases, including the House of Lords' examination of D.H.S.S. guidance in Gillick[7];the Privy Council's enforcement of procedural guidance in Shiu[8];the Court of Appeal's scrutiny of procedural guidance in Anderson[9] and their application of much of the above Privy Council reasoning in Khan[10];and the High Court's approval of interpretative guidance in Crake[11].

On the academic plane,in 1983 Craig uttered the following plea,

"...there are areas in which administrative institutions will develop rules or something closely akin to them,even if they are not expressly empowered to do so. ...The precise status of such rules may be unclear;they may be unknown to the public and they are often subject to no external scrutiny. ...we should recognise their existence,the absence of controls over them and consider what should be done about them."[12]

His concerns were amplified in the following year by

Harlow and Rawlings' examination of the way in which the Home Office used unpublished guidance to regulate the verification of immigrants' claims via X-ray and virginity testing. In their words,

"secretive administration allows government to secure goals politically difficult or impossible to achieve through the democratic process. No doubt Mr Rees [the Minister of State] understood this as well as K C Davis."[13]

Turpin has subsequently noted that similar provisions govern other important discretions including the statutory power to grant naturalization to aliens (s.6(1) British Nationality Act 1981) and the prerogative power to issue passports. Consequently,

"...such rules may supplement the law in allowing concessions to which there is no legal entitlement or in laying down the conditions on which discretionary benefits will be granted. A statement of the relevant legal rules will therefore often give an incomplete account of the circumstances in which claims are admitted by the administration."[14]

Most recently Baldwin and Houghton have declared their apprehension that,

"there is now discernible a retreat from primary legislation in favour of government by informal rules. Each time a government confronts a difficult regulatory task,it seems to come up with a new device:a code of practice,guidance note,circular,approved code,outline scheme,statement of advice,departmental circular-the list goes on. ... Our concern is that informal rules are too free from control by Parliament,executive,judiciary or any other source and that this freedom is increasingly open to exploitation."[15]

Whilst Baldwin and Houghton encompass a far wider range of provisions within their category of administrative rules (including statutory codes of practice and voluntary codes of self-regulation issued by private commercial bodies) than our definition of administrative

guidance contains, their analysis,like the one utilised by this work,is premised upon a functional classification of such provisions. However,whereas they consider only the judicial response to these administrative rules, this work,for the reasons explained in Chapter One,has pursued a more expansive conception of those agencies which establish norms recognised by modern public law and therefore we have also analysed the reactions of the P.C.A. and a major tribunal system towards administrative guidance.

The Organisational Context of Administrative Guidance

When the knowledge gained from Chapters Two ,Three and Five is aggregated we can conclude that a minimum level of administrative guidance will always have to be created and used by departments to regulate the decision-making of their large staffs. As the writings of the various organisational theorists demonstrated, the formal structure of bureaucratic organisations with authority distributed between hierarchical grades necessitates the use of such provisions as one means by which the senior officials seek to control the behaviour of the junior officials in order to achieve rational/efficient decision-making. The S.E.D. case-study revealed in detail how one departmental body actually utilised guidance to attain similar objectives. Moreover,the investigations of the P.C.A. confirmed the widespread usage of guidance to govern officials' decision-making across the whole spectrum of departmental administration, from the D.H.S.S.'s

guidance specifying the circumstances in which financial help towards the running costs of cars owned by disabled persons would be provided[16],to the Home Office's guidance elaborating the method by which prisoners' parole eligibility dates should be calculated[17].

The proportion of guidance falling within the different functional classes of guidance will vary from department to department according to the nature of the particular programme they are administering. Numerous factors play a part in determining this proportion,but from our research one fundamental determinant appears to be the form of the legal foundations of the programme. Chapter Three showed that where the programme is based upon a broad statutory discretion then the bulk of the guidance will be of the policy class,as it is necessary to explain the goals to be sought through the exercise of that power in individual cases;whereas programmes implementing detailed statutory provisions (as is the case with student grants in England and Wales) will primarily utilise interpretative guidance to clarify the meaning of statutory language for officials (c/f the interpretative guidance on the mandatory grant regulations produced by the D.E.S. noted in Chapter Three).

Additional guidance is created when departments use such provisions to secure other aims. These objectives are extremely heterogeneous and encompass ,inter alia, the subjection of individuals to a form of treatment which would not be politically

acceptable if made public (see Harlow and Rawlings above);unofficial law reform by means of guidance which does not accord with the intention of the legislator (Megarry criticised this practice in 1944[18] but we have still encountered it in current departmental administration eg. the Commissioners' purported introduction of a distiction between the V.A.T. liability of public and private sports facilities in En-tout-Cas Ltd.[19]);and what Baldwin and Houghton have termed Commendation,which occurs where departments seek to pursuade others to act in a certain way[20]. According to the ethical,political and legal acceptibility of the objectives and content of such provisions, their discovery by commentators may lead to public causes celebres (eg the Legal Action Group/Observer's expose of the L Code's illegal instructions to Legal Aid officers[21]). Our research on the various grievance handling agencies did not encounter many examples of such controversial uses of guidance,but,as we shall see below,only a fraction of the total amount of administrative guidance ever reaches the public domain and this factor may have reduced the agencies' exposure to such provisions.

To use a metaphor,we can describe the totality of guidance created by departments as constituting a world, the majority of which is composed of uncharted oceans to which the population have virtually no access and the minority of pieces form the continents which are gradually being explored by the population. Chapter

Three vividly demonstrated the differences between the quantity and nature of guidance governing decision-making at the various levels within the S.E.D. Awards Branch, compared with the summarised form which was available to the public in the annual guide. Such an unbalanced relationship between the quantity and quality of guidance available to officials as contrasted with that made accessible to the public was replicated in programmes being administered by other departments, including social security benefits paid by the D.H.S.S. and industrial grants disbursed by the Department of Trade and Industry[22]. Moreover Chapter Five showed that roughly two-thirds of all policy and procedural guidance encountered by the P.C.A. had never been published in any form. This discrepancy between the scale of the creation of guidance by departments and the public's awareness of the existence and use of these provisions results in a greater vulnerability of the latter group when they have dealings with departments. As we have discovered, citizens cannot adequately assess their entitlements if the basic principles governing the particular programme are not published[23]. Nor can they rationally analyse the remedies open to them to challenge unsatisfactory determinations by departments before the various grievance agencies if they are unaware of the content and form of guidance governing those determinations[24]. Therefore,later in this chapter we shall be examining how the position of citizens can be strengthened by increasing the availability of

information regarding the guidance used by departments.

However,public law does not restrict its cognizance of administrative guidance to the minority of provisions which are publicly promulgated. Chapter Five indicated how the powers of the P.C.A. enabled him to scrutinise the internal guidance used by officials,and even the courts have occasionally examined unpublished guidance which has been obtained during pre-trial interlocutory proceedings (eg. in Khan).[25] These responses are to be welcomed as they prevent departments from being able to completely shelter their guidance from outside review by non-publication.

The Legal Implications of Administrative Guidance

Irrespective of whether a remedial agency is being asked (directly or indirectly) to enforce the observance of a piece of guidance or declare its invalidity, two factors are of primary importance in determining the response of the agency. They are the functional content of the specific provision (ie. is it a piece of procedural,policy or interpretative guidance?),and the powers/jurisdiction of the agency. The interaction of these factors has provided the framework for the jurisprudence of the various agencies' responses towards the different categories of guidance analysed in earlier chapters. One consequence of this interaction is that each agency demonstrates a greater willingness to criticise the substance of that class of guidance which it considers falls within its own special area of

expertise. Therefore,the P.C.A. has been most strident in his condemnation of procedural guidance which he considers to fall below his standard of "good administrative practice"[26]. As Ganz observed, the P.C.A. "...plays a most important role in raising the standards of administrative procedure by means of persuasion on a case to case basis with results which no court or statute could achieve."[27] The courts displayed their strongest willingness to substitute their views for those of departments where they were faced with interpretative guidance,because of their assumed constitutional role as the final arbiters of legislative intent.[28] Likewise V.A.T. tribunals adopted an analogous stance towards interpretative guidance issued by the Commissioners.[29] Conversely all three agencies exhibited most reluctance to attack the substance of policy guidance. Lord Bridge indicated the judicial attitude towards such challenges in Gillick;the Sachsenhausen case[30] established the P.C.A.'s unwillingness to question the content of policy guidance; and in Cando 70[31] the inability of V.A.T. tribunals to scrutinise this class of guidance was expressed. The underlying explanation of this reaction may be found in the ancient constitutional practice whereby the parliamentary accountability of Ministers provides the dominant mechanism for the questioning of departmental policies.[32] This is reflected in the ostensible concentration upon issues of legality rather than merits during cases of judicial review[33],and the enactment of

section 12 Parliamentary Commissioner Act 1967. The outcome is that citizens face a virtually impossible task in seeking to encourage the agencies to review and if necessary condemn the content of this type of guidance.

Harmony between the reactions of the agencies can be detected in other facets of their deliberations regarding guidance. A high degree of unity occurred in their common acknowledgement that ultimately it was for the courts to rule on the meaning of legislative language and thereby determine the validity of interpretative guidance[34]. The P.C.A. expressly stated so in a case involving interpretative guidance issued by the D.o.E.[35], and V.A.T. tribunals asserted a similar right subject to an appeal on a point of law to the courts[36].

As for procedural guidance,we have already noted above that the P.C.A. examined these provisions to assess whether they conformed to good administrative practice. That standard incorporates legal values derived from origins as diverse as elementary criminal procedure[37],and Scottish property sale and conveyancing procedure[38]. Indeed, the case law revealed that the courts have the ability to review the legality of these provisions where the power of decision-making is subject to the obligations of procedural fairness[39]. So far they have concentrated upon guidance establishing the procedures for the disciplining of prisoners ; consequently their scrutiny has been to ensure that the

process contains basic components of the adversarial system of justice,including cross examination[40] and access to legal advice[41]. However,there is great potential for the cross-fertilization of ideas concerning the essential norms of administrative procedure between the evolving standards of good administrative practice and procedural fairness. The courts and the P.C.A. agencies also share another similarity in their responses to procedural guidance and that is in the emerging demand that departments follow the requirements detailed in such provisions. The P.C.A. has found that the failure of officials to observe these requirements amounts to an act of maladministration[42] and the judiciary have quashed decisions taken in violation of such procedural undertakings[43]; the sole distinction between their reactions has been that the courts only enforce published guidance whereas the P.C.A. equally applies the requirement to unpublished provisions.

From his earliest investigations the P.C.A. accepted the utilisation of policy guidance by departments to determine individual citizens' cases[44]. More recently the judiciary have also clearly stated their approval of this method of decision-making in the landmark cases of Schmidt[45] and British Oxygen[46]. But the investigative powers of the P.C.A. have enabled him to subject officials' application of policy guidance to a far more rigorous quizzing (including the finding of historical facts which the department had neglected[47])

than the innovative judicial decision of Khan would allow. The major exception to the harmony of the agencies' responses has been the conclusion of V.A.T. tribunals that their enumerated grounds of jurisdiction do not encompass policy guidance and that consequently they are unable to examine the creation and application of these provisions by the Commissioners.[48]

The general consistency of the agencies' responses to administrative guidance is significant for two important reasons. First it alleviates,at least for the strategic activities of the creation and application of guidance, Craig's apprehension that the adoption of a liberal view of his jurisdiction by the P.C.A. might result in conflict with the courts due to "...the development of two views upon the same subject matter which are inconsistent,or the application of the same view in an inconsistent manner."[49] So the P.C.A. should be encouraged to continue investigating complaints involving guidance where he has special expertise (eg. procedural guidance regulating decision-making not yet subject to procedural fairness) or a greater ability to penetrate the complexities of the administrative process (eg. departmental application of unpublished policy guidance). Secondly,and more generally,the congruous nature of the responses indicates that despite the minimal number of overt cross-references between the recorded decisions of the separate agencies, they share a common core of values concerning the basic necessities of efficient and good administrative practices.

In particular we can note that all the agencies have generally approved of the use of administrative guidance by departments. The reason for this appears to be that each agency has recognised the organisational/administrative necessity for these provisions. Hence the P.C.A. has acknowledged that policy guidance enabled departments,to define the aims of their programmes[50]; encourage consistency in decision-making[51]; and regulate the expenditure of monies (a requirement which is likely to be of great significance in these days of cash limits)[52]. For similar reasons the judiciary sanctioned the utilisation of these provisions in British Oxygen. They also supported the creation of interpretative guidance to guide officials towards an understanding of vague/complex statutory phrases in Crake; and V.A.T. tribunals replicated that view in Grimsby Football League[53]. In C.P.A.G. the courts validated the creation of procedural guidance to establish the methods by which officials should perform their duties.

The obligations placed upon departmental use of guidance by the agencies can be seen to be compatible with existing organisational practices. For example,the judicial tailoring of the non-fettering principle to departmental discretionary decision-making in Schmidt and British Oxygen shares many features with the actual processing of student grant applications by the Awards Branch. As we have seen,the territorial officers were bound by an extensive array of precise administrative

rules,but hard cases could be passed up to the senior executive officers who possessed the power to dispense with the detailed rules and determine the case in accordance with the underlying values of the scheme. By such a procedure the Awards Branch were, albeit unknowingly,following the dictates of Lords Denning and Reid, by having regard to applicants' claims that their cases should be treated as exceptions to the rules or that the policy governing the scheme should be changed. However,our research on the Awards Branch suggests that citizens should not expect the British Oxygen duty to produce many changes of fundamental policies by departments;instead citizens should concentrate upon seeking to persuade departments that their cases are exceptional and ought not to be determined according to the ordinary rules.

The agencies' scrutiny of the application and observance of guidance by officials can also help to reinforce the monitoring of junior officials' behaviour by senior management. As Chapter Three indicated, departments may well have elaborate checking systems,but these cannot detect all the detrimental effects of informal organisational behaviour. External agencies, particularly the P.C.A.,can play a useful secondary role in discovering and highlighting these inevitable tendencies. An example of this was the P.C.A.'s finding that zealous inspectors were ignoring their procedural guidance and using defective vehicles when conducting incognito inspections of garage testing facilities.[54]

From their accumulated wisdom (whether derived from regular exposure to the practices of different departments in the case of the P.C.A. or through the evolution of relevant legal values by the judiciary) the agencies are able in appropriate contexts to improve the quality of departmental processes by their review of procedural guidance. As we have already seen one area where this has been particularly noticeable is that of prison administration.

Overall,therefore,the responses of the different agencies have been complimentary to the best practices of departments in the creation and use of guidance. The restraints and requirements mandated by the agencies cannot be viewed as unrealistic in their demands when compared with the organisational needs of departments. Nevertheless,they have provided a level of protection for citizens against the ever present dangers of officials rigidly applying guidance[55] or arbitrarily departing from it[56].

Turning now to the lessons which can be learnt from the judicial consideration of provisions analogous to administrative guidance in the U.S.A.,these relate primarily to the procedural and interpretative forms of guidance. In Vitarelli v. Seaton[57] Frankfurter J required the Secretary to follow his procedural guidance because,"...an Executive agency must be rigorously held to the standards by which it professes its action to be judged."[58] Twenty four years later Lord Fraser,on behalf of the Privy Council,determined that the Hong Kong

government was legally obliged to respect its procedural promises because of,"...the principle that a public authority is bound by its undertakings as to the procedure it will follow..."[59]. The similarity of reasoning suggests that the contemporary common law conception of administrative morality now demands that in the absence of exceptional circumstances public bodies must respect their proclaimed procedures. This is to be welcomed as it enables citizens to ensure that their cases are processed according to established procedures. Furthermore the fact that Vitarelli has been applied in subsequent U.S. cases[60] should give added reassurance to our judiciary that Parker LJ's incorporation of the Shiu principle into domestic U.K. law can be extensively invoked without crippling central government administration.

As we saw in Chapter Four the U.S. Supreme Court has expounded a set of criteria which it utilises to determine when the contents of interpretative guidance will be endorsed by the judiciary. Jackson J said they included,(a)the thoroughness of consideration;(b)the validity of the reasoning;and (c)the consistency of views,underlying the promulgator's guidance.[61] The British judiciary have not yet expressly articulated the factors which they use to assess such guidance (eg.those motivating Woolf J's approval of the tests for "co-habitation" found in the Supplementary Benefits Handbook[62]). Therefore,the American practice should stimulate our judiciary into openly formulating the

criteria which they apply,so that departments can comprehend what they must seek to do in order to create guidance which will receive judicial support, and also to enable citizens to gain a clearer understanding of the circumstances in which they can successfully challenge this form of guidance before the courts.

On the basis of this research we can suggest a number of other developments in the responses of the various agencies that would not necessitate legislation,but the consequences of which would fortify the position of citizens against the potential abuse of guidance by departments. (a)The courts should not be deterred by Lord Bridge's dicta in Gillick from reviewing the legality of guidance which appears prima facie to be illegal (eg. as in Cooke[63] and Anderson[64]) as the adaptation of the general principles of legality to the phenomenon has not prevented the legitimate use of these provisions by departments. In addition the judiciary should consolidate the existing application of the concepts of fairness and legitimate expectation[65] to require the observance of all three classes of guidance by officials;furthermore the case by case extension of this requirement ought to enable the judiciary to refine the factors entitling a department to claim that it cannot observe its guidance because of the demands of "public interest".

(b)V.A.T. tribunals must overcome their reluctance to condemn those parts of Public Notices which contain erroneous interpretations. The resulting benefits will

include the alerting of other taxpayers to the inaccuracies and thereby prevent them from relying upon a misunderstanding of the law which may entail the irrecoverable payment of excess monies in taxation[66]. From this would also ensue pressure upon the Commissioners to rewrite their interpretative guidance so that it accords with the tribunal's declared view of the law.

(c)The resources available to the P.C.A. need to be strengthened so that he has ready access,either within or outwith his staff,to the knowledge of lawyers. This will enable him to make up his own mind as to the thoroughness with which departments have created their interpretative guidance,without having to rely on the assertions of departmental lawyers[67]. Also his Select Committee should revitalize their scrutiny of the outcomes of departmental undertakings to review their guidance,given as a consequence of the P.C.A.'s criticism of those provisions during investigations into alleged maladministration. At present there is no systematic monitoring of these undertakings and the public do not know if they are being honoured or ignored.

Legal Responses to Administrative Guidance in the Future

To conclude this thesis we shall examine the emerging debate concerning the alterations in departmental practices which are necessary if administrative guidance is to be accorded full membership of the hierarchy of norms recognised by our

legal system.[68] Craig has argued that the only viable method by which such provisions can gain legal "validation" is through the imposition on departments of a statutory duty to consult with interested persons prior to the promulgation of guidance.

"The central issue becomes one of validation by this indirect method or not at all. However,imperfect a surrogate such consultation is felt to be (and I am not implying that it is in fact so imperfect) the choice is between legitimation or control through this indirect mechanism or quietly closing one's eyes and pretending that the problem does not exist."[69]

His advocacy of consultation is also replicated in the general discussion regarding the contemporary priorities of public law by many commentators.[70] But Baldwin and Houghton reject the idea of a statutory obligation to consult because,

"...just as legislators are in a poor position to set substantive standards for administrative rule-making,they are also ill-situated to lay down detailed procedural requirements."[71]

Instead they recommend the judicial application of common law duties requiring consultation and the subsequent publication of guidance,as they believe this form of legitimation is more flexible and can react to the "bureaucratic realities" of departmental administration.

It is surely questionable if our judiciary has the capacity to forge such fundamental changes in civil service attitudes and practices without the endorsement of Parliament in the form of legislation. Logie has already catalogued the problems facing,and weaknesses of, judicial enforcement of consultation procedures.[72] And secretiveness is so ingrained in the mentality of

British public administration[73], that measures short of an express statutory reversal of the present presumption in favour of secrecy are almost inevitably doomed to failure.[74] As Rowat has warned, even in a legal culture far more conditioned towards openness than our own, the mechanisms necessary to ensure access to government documentation must be elaborate:

"...the lesson of American experience is that a comprehensive right of public access cannot be successfully established unless the matters which may be kept secret are spelled out by statute in limiting detail and there is provision for appeal against the witholding of documents, in order to ensure that the right can be enforced."[75]

Therefore, the most efficacious strategy for securing the full legal and constitutional acceptibility of guidance would be for Parliament to enact a Freedom of Information Act, to be policed by an information ombudsman[76], which inter alia provided for public access to guidance generally issued to all officials administering a programme. This right would enable interested citizens to read and copy the internal manuals which are the bibles that govern most departmental decision-making.[77] Such a development would significantly increase the acceptability of guidance for two reasons. First citizens' comprehension of the nature of departmental use of guidance would be greatly strengthened, thereby facilitating the resort to grievance handling agencies (particularly the courts) where departmental practices violated the standards established by the agencies (eg. officials following procedural guidance which infringed the norms of

procedural fairness). Secondly,at present the substance of policy guidance is virtually free from scrutiny by outside bodies,but the availability of such provisions under a Freedom of Information Act should promote public discussion regarding them both inside and outside of Parliament. Consequently a statutory duty of consultation would only be necessary if these deliberations were ignored by the departments.[78] The outcome of this strategy would be to ensure that administrative guidance fulfilled its potential in producing co-ordinated movements rather than nervous twitches in our governmental anatomy.

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24 See the conclusions to Chapter 7.
25 But c/f the Court of Appeal's recent view on the limited scope of discovery in actions for judicial review R. v. Lancashire C.C.,ex p.Huddleston [1986] 2 All E R 941.
26 See C.56/G H.C.18 (1972-73).
27 G Ganz,Administrative Procedures,p.107.
28 See M'Lean v. Paterson 1939 S.C. 52.
29 See Darlington B.C. v. The Comms. (1980) V.A.T.T.R. 120.
30 H.C.54 (1967-68).
31 Cando 70 v. The Comms. (1978) V.A.T.T.R. 211.
32 See J D B Mitchell,"The Causes and Effects of the Absence of a System of Public Law in the U.K.",[1965] P.L. 95.
33 See H W R Wade,Administrative Law,pp.34-36.
34 See Royal College of Nursing v. D.H.S.S. [1981] 1 All E R 545.
35 C.364/G H.C.178 (1972-73).
36 Normal Motor Factors Ltd. v. The Comms. (1978) V.A.T.T.R. 20.
37 C.486/81 H.C.8 (1982-83).

38 C.483/80 H.C.132 (1981-82).
39 See McInnes v. Onslow-Fane [1978] 1 W L R 1520 for Megarry V.C.'s classification of the decision-making contexts in which fairness applies.
40 R. v. Hull Board of Prison Visitors,ex p.St.Germain [1979] 1 All E R 706.
41 Anderson Op. cit..
42 C.87/82 H.C.8 (1982-83).
43 Shiu Op. cit..
44 See the Sachsenhausen Case Op. cit..
45 Schmidt v. S of S for Home Affairs [1969] 1 All E R 904.
46 Op. cit..
47 C.133/81 H.C.132 (1981-82).
48 See David Wickens Properties Ltd. v. The Comms. (1982) V.A.T.T.R. 143.
49 Op. cit. p.249 and see the conclusions of Chapter 5.
50 15/589/77 H.C.246 (1977-78).
51 215/5/77 H.C.524 (1977-78).
52 C.66/T H.C.406 (1972-73).
53 Grimsby Op. cit..
54 C.169/68 H.C.129 (1968-69).
55 Ibid. C.665/68.
56 4/36/77 H.C.246 (1977-78).
57 3 Led. 2d. 1012 (1959).
58 Ibid. p.1021.
59 Shiu Op. cit..
60 Eg. U.S. v. Heffner 420 F 2d. 809 (1970).
61 Skidmore v. Swift Co. 89 Led. 124 (1944).
62 Crake Op. cit..
63 R. v. Comms. of Customs and Excise,ex p. Cooke and Stevenson [1970] 1 All E R 1068.
64 Op. cit..
65 See D C Hodgson,"The Current Status of Legitimate Expectation in Administrative Law",14 Melbourne Uni. L.R. 686 (1984).
66 See Grimsby Op. cit. and the discussion of the application of the principles of restitution by tribunals in Chapter 7.
67 See C.261/68 H.C.129 (1968-69).
68 C/f the similar debate which preceded the enactment of the Statutory Instruments Act 1946.
69 Op. cit. p.218.
70 Including Z Bankowski & D Nelken,"Discretion as a Social Problem",in Adler & Asquith;Tony Prosser,"Towards a Critical Public Law", 9 J.L.& S. 1 (1982);and Allan C Hutchinson,"The Rise and Ruse of Administrative Law Scholarship",48 M.L.R. 293 (1985).
71 Op. cit. p.274.
72 James G Logie,"Promoting Public Participation Through the Courts:Enforcing Consultation Procedure",136 N.L.J. 768 (1986).
73 See David Leigh,The Frontiers of Secrecy:Closed Government in Britain.
74 C/f the fate of the Croham Directive of July 1977.
75 Donald C Rowat ed.,Administrative Secrecy in Developed Countries,p.17.
76 C/f the JUSTICE report,Freedom of Information (1978).

77 The Freedom of Information Act 1966 passed by the U.S. Congress expressly provided for such a right see the chapter by Michael J Singer in Rowat Op. cit..

78 Note the congressional and judicial reluctance to subject analogous provisions to the notice and comment procedure in the U.S.A. examined in Chapter 4.

APPENDIX A

AWARDS BRANCH FIELD-STUDY : RESEARCH METHODOLOGY

The materials upon which Chapter Three was based,were gathered during the early part of 1983. Their collection utilised the concept of participant observation which according to McCall and Simmons,"...is not a single method but rather a characteristic style of research which makes use of a number of methods and techniques-observation,informant interviewing, document analysis, respondent interviewing and participation with self analysis."[1] It had the object of discovering,"...what is fundamental or central to the people or world under observation"[2],so that a qualitative analysis of the particular organisational situation could be produced.

Inevitably the empirical research was subject to conditions of access which in this case included,inter alia,the author having to "sign the Official Secrets Acts";limitations on the ability to examine individual case files and policy papers;and respect for the anonymity of civil servants and applicants. Whilst the first two restraints have undoubtedly influenced the quantity and nature of the materials upon which the chapter was constructed,the general ethics of social science research would have independently mandated the latter restriction.

The research began in January when all the available published materials concerning the Branch's administration of the Scheme were scrutinised (eg. P.C.A. reports,Annual Guide to the Scheme and S.E.D. organisational charts). Then a list of six areas of interest covering the Branch's experience of administrative guidance was drawn up on the basis of the information gathered from the documentary analysis. Topics encompassed by the list included the reasons for the particular form of rules regime governing the programme;the extent and nature of intra-Branch guidance ;staff attitudes towards that guidance;and the system of guidance revision. Thereupon personal contact with the senior officers of the Branch was established and after discussing the orientation of the field-work it was agreed that the author would be permitted to interview different officers within the Branch. However,prior to the interviewing the author was allowed to attend a two week training course,held in the Branch,for several new Executive and Clerical Officers. Sitting in on the training course was an extremely rewarding experience as it enabled a comprehension of the formal structure and terminology of the organisation to be acquired before the actual detailed questioning of officers began. Furthermore it had the unanticipated consequences of providing an extended period of contact with junior officers during which their perceptions of the Branch's administrative process could be discovered,whilst simultaneously reducing the "threat" presented by the author qua an "outsider" as members of the organisation

became more used to his presence.

In the light of the information gained during the training course an interview guide containing eight fields of interest (including the differences underlying the various types of intra-Branch guidance;the grounds upon which decisions to publish Branch guidance were made;the nature of appeals/complaints to the Branch) was drawn up. That guide was then used as the basis for a series of in depth "unstructured interviews" with officers of different grades within the Branch. The interviews were unstructured in the sense that they were not intended to be confined to a specific range of questions with delimited answers, but were designed "...to elicit from the interviewee what he consider[ed] to be important questions relative to a given topic,his descriptions of some situation being explored."[3] The officers were selected via a snowball approach of following up leads and recommendations derived from earlier stages of the field-work or prior interviews. Over the ensuing three weeks ten officers (covering every grade from Executive Officer to Principal) voluntarily agreed to be interviewed,with each session lasting on average between two to three hours (the longest continued for four hours and ten minutes without a break). The explanations and comments of the interviewees were recorded in contemporary jotting notes which were subsequently converted into a daily diary each evening. It should also be stated that the territorial officers came from different sections in order to reduce the possibility of collecting unrepresentative insights. After the interviews had been completed an assessment of the totality of received information was undertaken and that was supplemented by a final materials gathering visit at the beginning of April.

To conclude the author would like to express his gratitude to those persons who enabled his access into the Branch,particularly the Senior Principal of the Awards Branch,and to the staff of that organisation. Additionally he desires to thank Professor A W Bradley who initially established the possibility of the study and Dr D Nelken for his continuous and invaluable support during the actual field-work.

REFERENCES

1. George J McCall and J L Simmons,Issues in Participant Observation,p.2.
2. John Lofland,Analyzing Social Settings,p.4.
3. Ibid. p.76.

APPENDIX B

PARLIAMENTARY COMMISSIONER CASE REPORTS

licy Guidance

Report of the Parliamentary Commissioner for Administration

1968 H.C. 129 (1968 - 1969)

1. C.206/68 Foreign Commonwealth Office P.31

A post-Sachsenhausen case. The Department had created the 'Butler Rules' to govern the distribution of compensation to British victims of Nazi persecution. Complainant critised the way in which his application for compensation had b een handled by the Department. The P.C.A. found the Department's conduct amounted to maladministration and they agreed to review the complainant's case.

2. C.445/68 Home Office P.47

The complainant was a prisoner. He wrote to a marriage bureau but the Assistant Governer of his prison refused to allow the letter to be posted under rule 33 of the Prison Rules 1964. The Department then promulgated a general departmental rule that prisoners should not be allowed to communicate with marriage bureaux. The prisoner complained about the withholding of his letter; however, the P.C.A. found no evidence of maladministration as the Department were merely following their departmental rule.

3. C.364/68 Ministry of Housing and Local Government P.69

In 1968, at the instigation of the Land Commission, the Department announced an extra-statutory concession for citizen's buying and selling a single plot of land for their own habitation from liability to Betterment Levy. The complainants complained of delay in granting them relief from

hardship. The P.C.A. did not wish to express a view on the propriety of the Department making this concession, and found no maladministration.

4. C.665/68 Board of Trade P.113

The Department operated an extra-statutory scheme for the repayment of assets to hiers of persons whose property had been confiscated during the Second World War. The complainant had been refused repayment under the terms of the scheme and complained to the P.C.A. The Commissioner found that the Department had applied those terms without maladministration, but after reviewing the complainant's case they decided to repay the assets to the complainant.

5. C.599/67 Ministry of Transport P.114

The Minister had a statutory power to appoint and remove approved vehicle testing stations (under the Motor Vehicles (Test) Regulations 1969). He had developed a policy provisions that he would not approve applications from garages which were under the control of a person who had been convicted of any criminal offence within the preceding two years. Complainant applied for approval but was refused in accordance with the above provision. The P.C.A. found that in the circumstances of her case the Ministry had applied their policy guidance in a manner amounting to maladministration. Therefore the Ministry agreed to reconsider her application.

6. C.133/68 Ministry of Transport P.131

Government policy on the awarding of costs to parties appearing before Public Local Inquiries was set out in M.H.L.G. circular 73/65. Complainants applied to the Minister for their costs to be paid but he refused

on the basis of the rules contained in the above circular. The P.C.A. found no maladministration as those rules had been properly applied.

7. C.227/68 Ministry of Transport P.139

Under s.48 Town and Country Planning Act 1959 the Minister had a discretionary power to purchase property from non owner-occupiers in advance of the issuing of a compulsory purchase order. However, the Ministry had created general rules governing the circumstances in which this discretion would be exercised. The complainant requested the Ministry to purchase this property before the issuing of a compulsory purchase order but they refused. The P.C.A. concluded that there had been no maladministration as the Ministry had simply applied their general rules.

First Report of the P.C.A. for 1972-1973 H.C.18 (1972-73)

8. C.86/G D.H.S.S. P.98

Under article 65 Royal Warrant the Secretary of State had a discretion to backdate the payment of war pensions from before the time of the successful application of appeal. He had developed policy guidance to regulate the exercise of the discretion. Complainant sought the back-dating of his pension, but the Department refused. The P.C.A. suggested that the complainant's case did come within one of the categories of the guidance and the Department agreed with his conclusion. Consequently the pension was backdated and the P.C.A. considered that such an outcome remedied the injustice the complainant had suffered as a result of depart-mental maladministration.

9. C.38/G Inland Revenue P.128

In 1971 the Government published a 'White Paper' (Cmnd. 4729) setting out the circumstances in which they would not collect income tax legally due but subject to delayed assessment because of departmental error. The complainant sought the benefit of the above concession but it was refused because her level of income fell outside the limits in the White Paper. The P.C.A. rejected any suggestions of maladministration as the Department had properly applied the terms of the concession.

10. C.191/B Department of Trade and Industry P.181

This Department had the statutory duty of enforcing the Companies Act 1948. Their predecessor had created guidance regulating the bringing of prosecutions against companies and their officers, which had been presented to the Jenkins Committee on Company Law. The complainant criticised the Department's failure to prosecute the directors of a particular company. In the light of his investigation the P.C.A. concluded that the Department's conduct in failing to implement their guidance had resulted in maladministration; however, he could not calculate the degree of injustice suffered by the complainant and anyway there was no remedy available to alleviate it.

11. C.196/G Department of Trade and Industry P.200

Under s.168 Companies Act 1948 the Department had a discretion to publish reports into the affairs of specific companies. During 1965 the Department's predecessors published their guidance governing the exercise of that discretion. The complainant complained that this guidance was not followed in relation to one such report. The P.C.A. found that

special circumstances prevailed in this case and that there had been no maladministration.

Fourth Report of the P.C.A. for 1972-1973 H.C.290 (1972-73)

12. C.248/G Department of the Environment P.52

Another complaint concerning M.H.L.G. Circular 73/65. Complainant objected to a compulsory purchase order before a Public Local Inquiry but it was confirmed by the Department. He sought to have his costs incurred at the Inquiry paid, but the Department refused his request under the terms of the above circular. The P.C.A. suggested that the Department might review their policy guidance which they did; however, they decided not to change its provisions. Therefore, the P.C.A. could not make a finding of maladministration.

13. C.521/G D. o. E. P.88

Another complaint involving the Department's statutory power to appoint and remove approved vehicle testers. The Department's relevant guidance also provided that the power to remove a garage's designation would be invoked for a single failure to comply with the requirements of the test. The complainants lost their designation through an application of the above guidance and complained to the P.C.A. He found that the guidance was applied impartially and no maladministration had occurred.

14. C.329/G D.H.S.S. P.100

Departmental guidance specified the conditions of eligibility for financial help towards the running costs of private cars owned and used by severely

disabled persons. The complainant condemned the Department's refusal to provide him with such support. The P.C.A. found no maladministration as the complainant's case had been determined in accordance with the relevant guidance.

15. C.552/G Inland Revenue P.159

Up until 1970 the Department had operated an 'ex gratia' scheme for paying interest on delayed repayments of overpaid estate duty. After that year, the scheme had been abolished. The complainant had to wait two years for the Department to repay her. She complained to the P.C.A. about their refusal to pay her interest. The P.C.A. found the Department unwilling to pay interest and therefore concludedthat the complainant had suffered injustice as a consequence of maladministration.

Fifth Report of the P.C.A. for 1972-1973 H.C.406 (1972-73)

16. C.478/G Department of Education and Science P.22

In their circular 18/66 the Department set out the factors to be considered in calculating the grant payable to students on teacher training courses. The complainant challenged the application of the above formula to his own circumstances. The P.C.A. concluded that parts of the circular were ambiguous; however, as the Department had agreed to give the complainant the benefit of the ambiguity and to revise the circular, the Commissioner considered such actions to be a satisfactory outcome.

17. C.66/T D.o.E. P.70

Another complaint concerning the Department's application of their

guidance governing their statutory discretion to buy in advance 'blighted' property. The P.C.A. investigates whether the Department have reviewed these rules, discovers that they have and finds no maladministration.

18. C.419/G D.H.S.S. P.103

The Department may direct hospital authorities to make 'ex gratia' payments to patients who have suffered as a reult of negligent treatment if certain conditions are met. Complainant alleges that he should be given such a payment. The P.C.A. rejects his allegation of maladministration as the Department correctly applied those conditions to his case.

19. 380/G Inland Revenue P.135

Another complaint involving the 1971 White Paper providing concessions regarding delayed assessments of income tax due. The White Paper expressly excluded most assessments of income tax due under the P.A.Y.E. scheme and levied within two years of the liability arising. The complainant argued that he should be treated as an exception to this provision and the P.C.A. agreed. However, the Department refused to grant him the concession.

20. C.471/G Scottish Education Department P.180

The Secretary of State had a statutory discretion (under s.12 Education (Scotland) Act 1969) to pay an allowance to students in full time education and he had developed an extensive set of administrative rules to govern the exercise of that discretion (see Chapter Three for case-study). The complainant was refused an allowance and complained to the P.C.A. The Commissioner found no evidence of maladministration as the application had been determined in accordance with these provisions.

First Report of the P.C.A. for 1977-1978 H.C.126 (1977-78)

21. C.258/K D.H.S.S. P.60

Another complaint concerning the Secretary of State's prerogative power to backdate war pensions. The P.C.A. concludes that the complainant's situation comes within the guidance authorising the exercise of the discretion and that the Department should make an 'ex gratia' payment of interest on the arrears of the pension.

22. C.454/77 D.H.S.S. P.40

The Secretary of State had a statutory discretion to backdate the time at which a married woman was deemed to have elected to pay full national insurance contributions. He had produced guidance to regulate the exercise of this power. The complainant criticised the unwillingness of the Department to backdate her election. The P.C.A. discovered that her case had been decided in accordance with the guidance and, therefore, he did not condemn the Department's decision.

23. C.480/77 Home Office P.155

Under s.3(3) Post Office Act 1969 the Secretary of State had a discretion to make refunds on surrendered t.v. licences. The Secretary published details of the limited circumstances in which he would make refunds on the back of licence forms. The complainant applied for a refund but it was refused. He complained to the P.C.A. about the Department's interpretation of the guidance printed on the licence. The P.C.A. concluded that the wording of the guidance was ambiguous, but that the complainant's interpretation was an unreasonable one. Therefore, the Commissioner

made no finding of maladministration ; nevertheless, the Department agreed to re-draft their guidance.

24. C.451/K Inland Revenue P.165

The Department informed the Select Committee on the P.C.A. of the circumstances in which they would pay a taxpayer's costs in employing professional advisers to settle his fiscal liabilities (see H.C. 488 (1975-76). The complainant claimed that the Department should pay his costs. The P.C.A. found that they had assessed the complainant's claim in accordance with the above criteria and there had been no maladministration.

25. C.126/77 S.E.D. P.268

Another complaint involving the Department's guidance governing students' allowances. The complainant protested at the way in which the Department took account of his foreign earnings. After the P.C.A. began his investigation the Department changed their guidance to accord with English practice. However, the Commissioner found no maladministration in the treatment of the complainant.

Third Report of the P.C.A. for 1977-1978 H.C.246 (1977-78)

26. 15/507/77 Department of Energy P.48

In 1977 the Department operated the non statutory Electricity Discount Scheme which gave social security claimants a twenty five percent reduction on their winter electricity bills. The complainant criticised the Department's refusal to accord him a discount on his heaviest meter reading. The P.C.A. concluded that the published details of the scheme

were ambiguous, but could be justified because of the ad hoc nature of the scheme. Therefore, the Department's apology to the complainant was a sufficient remedy for him.

27. 15/589/77 Ministry of Overseas Development P.236

Under the Overseas Development and Service Act 1965 the Minister had a power to make contributions towards the salaries of persons working overseas. The Ministry created the non statutory British Expatriates and Public Service Supplementation Scheme within the four corners of the above discretions. The complainant was refused an award under the scheme and had his case referred to the P.C.A.. The Commissioner found that the Ministry had determined his case by applying the rules of the scheme and consequently dismissed his complaint.

Fifth Report of the P.C.A. for 1977-1978 H.C.524 (1977-78)

28. 1B/637/77 Inland Revenue P.246

The Inland Revenue are willing to remit interest payments on overdue tax liabilities in a limited number of circumstances, according to non statutory policy criteria. The Department refused to remit the complainant's interest charges incurred through erroneous information given by a member of the Department. The P.C.A. investigated and the Department reconsidered their initial decision, with the outcome that they agreed to remit the interest charges.

29. 2/515/77 Department of Trade P.273

Under s.161 CompaniesAct 1948 the Secretary of State had a discretion to

approve professionally unqualified persons as company auditors. The Department had developed an extensive regime of administrative guidance to regulate the exercise of this discretion which, inter alia, detailed the experience required of applicants. The complainant was refused approval and complained to the P.C.A.. The Commissioner found that he had been treated on the same basis as all applicants and dismissed the complaint.

Seventh Report of the P.C.A. for 1977-1978 H.C.664 (1977-78)

30. 3A/633/77 D.H.S.S. P.79

The Secretary of State had a discretion under s.33 Health Services and Public Health Act 1968 to provide severely disabled persons with small motor cars. Department rules specified categories of eligibility. The complainant applied for a car with an automatic gearbox but the Department would only provide her with a car containing a manual gearbox. She complained to the P.C.A. who found that there had been no maladministration as the Department had assessed her case in accordance with the above rules.

31. 1B/656/77 Inland Revenue P.179

S.29 Finance Act 1965 allowed relief from Capital Gains Tax in respect of increases in the value of a taxpayer's main dwellinghouse for the last twelve months of ownership. During 1974 the property market experienced an extensive depression so the Department announced that as an extra-statutory concession the above period would be enlarged to twenty four months; however, if the property was not sold within that period then only the statutory relief would be granted. The complainant applied for

relief in respect of the last three years of ownership and was granted twelve months relief. He complained to the P.C.A. who examined whether the Department should have been willing to consider cases falling outside the ambit of the concession. The Commissioner accepted the Department's view that they were bound by the terms of the statute and the concession and dismissed the complaint.

P.C.A. Selected Cases 1982 Volume One H.C.132 (1981-82)

32. C.133/81 D.o.E. P.38

The Secretary of State had a discretion under s.161(1) Local Government Act 1972 to remove ultra vires payments from the purview of the District Auditor. The Department had guidance regulating the exercise of this discretion which provided that it would be used where, inter alia, the local authority were under a clearly defined moral duty to make the payment. A Council applied for approval of an ex gratia payment to a pensioner they had rehoused but the Department refused. The P.C.A. found no evidence of maladministration in the actions of the Department but suggested that they might re-consider the application in the light of the evidence produced by his inquiry. The Department agreed and later approved the payments.

33. C.653/80 Inland Revenue P.79

Another case concerning the application of the Department's guidance governing the payment of taxpayer's professional advisers costs. The complainant had sought the payment of his costs but the Department and the Minister had refused. However, the Minister had informed the taxpayer

that he could complain to the P.C.A.. This he did and the Commissioner concluded that the complainant came within the Department's guidance; subsequently the Department agreed to pay the costs.

Report of the P.C.A. for 1968 H.C.129 (1968-69)

1. C.831/67 Foreign and Commonwealth Office P.29

In 1966 the Department announced a non statutory procedure, whereby the divorced parents of British children could register 'caveats' with the Passport Office. The effect of such a caveat was that the Office would notify the parent of an application for a passport for the child and delay the issuing of a passport until the parent had been able to take steps to secure his/her legal rights over the child. The complainant registered a caveat over his son in 1966 but through a failure in the Office he was not notified of an application for a passport for the child. The Office issued the passport and the child was taken to America by his mother. Later the complainant had his case referred to the P.C.A. who found maladministration by the Office which had caused the complainant to suffer an injustice which could not be remedied.

2. C.169/68 Ministry of Transport P.136

Departmental instructions to staff employed as vehicle examiners provided for the conduct of incognito inspections of garages testing services. These instructions stated, inter alia, that defective vehicles should not be used. The complainants were subjected to such an inspection and subsequently had their authorisation withdrawn by the Department. They complained to the P.C.A. about the conduct of the inspection. The Commissioner found that provocative methods had not been used and there was no evidence of maladministration in the inspection of the complainants. However, the P.C.A. did discover that some examiners were using defective vehicles in breach of their instructions, but the Department had agreed to revise these instructions.

First Report of the P.C.A. for 1972-1973 H.C.18 (1972-73)

3. C.88/G Customs and Excise P.4

Departmental instructions stated that customs officers should not return official forms for minor corrections to import agents. The complainants had one of their forms altered by an officer and complained to the P.C.A.. The Commissioner stated his approval of the above instructions and rejected all suggestions of maladministration.

4. C.223/G Department of Education and Science P.8

Under the Education Act 1944 the Secretary of State had a statutory discretion to pay up to eighty percent of the costs of building work undertaken by voluntary aided schools. The Department had a booklet detailing the procedures to be followed by schools applying for building grants. The complainant, a chairman of the Governors of a voluntary aided school, challenged the procedures and the Department's unwillingness to accord exceptional treatment to his school. The P.C.A. concluded that the procedures were reasonable and that there was no evidence of maladministration in the Department's refusal to waive those procedures for the benefit of the complainant's school.

5. C.458/B D.o.E. P.21

Because of the prerogative powers of the Crown central government departments are not bound by the Town and Country Planning Acts. However, they observed the non-statutory Circular 100 procedure which required the department proposing to engage in development to consult the local planning authority. The complainants, who were neighbours of a proposed Post Office

sorting complex, complained that they had not been consulted by the relevant department. The P.C.A. found that the Post Office had observed the terms of Circular 100 and therefore dismissed the complaint.

6. C.56/G D.o.E. P.46

M.H.L.G. circular 73/65 provided, inter alia, that the Secretary of State would determine the costs of successful objectors represented before Public Local Inquiries by advisors other than lawyers. The Department had an 'ad hoc' practice of referring such bills to their legal division for 'taxing'. The complainant objected to the taxed bill approved in his case by the Department. After completing his investigation the P.C.A. criticised the way in which the Department had been determining this category of costs but noted that a new procedure for taxing them by High Court Masters had been introduced by circular 69/79.

Third Report of the P.C.A. for 1972-1973 H.C.178 (1972-73)

7. C.316/G D.o.E. P.81

The complainant protested about the absence of publicity concerning a town by-pass scheme put forward by the Department. The P.C.A. discovered that the Department had complied with their existing practices regarding publicity, but that subsequently new departmental rules had been promulgated requiring greater information to be disclosed to the public.

Fifth Report of the P.C.A. for 1972-1973 H.C.406 (1972-73)

8. C.497/G D.o.E. P.48

Under the Highways Act 1959 the local highways authority was not responsible for roads until they had been made-up at the expense of the frontages. By s.207 of the above Act frontages could app eal to the Secretary of State to determine the cost of making up. The Department's procedure for determining such appeals was based upon written representations from the appellant and the local highways authority. The complainant/appellant wrote to the Department and asked at what level in the organisation his appeal would be determined. The Department informed him at Assistant Secretary rank. Later the Department changed their procedure and the appellant's appeal was decided by a Principal. The appellant complained to the P.C.A. about this change in the procedure for determining his appeal. The Commissioner dismissed the complaint stating that it was for the Department to appoint officials to act in the name of the Secretary of State.

First Report of the P.C.A. for 1977-1978 H.C.126 (1977-78)

9. C.791/K D.o.E. P.31

Another case involving circular M.H.L.G. 73/65. The complainants criticised the way in which the Department refused their application for costs. The P.C.A. discovered that the Department did not fully observe the circular's provisions and, therefore, were guilty of a procedural shortcoming. However, he did not consider such a defect amounted to maladministration.

10. C.260/77 D.H.S.S. P.108

The complainant, who was a war pensioner, protested about the procedure followed by a Medical Board. The P.C.A. found that internal working instructions detailing the prior provisions of information to persons

appearing before Boards had not been observed and that there had been a breach of standing instructions to Medical Officers concerning the conduct of the Board. The Department apologised for their failings.

11. C.29/77 Department of Transport P.306

The Department operated a non statutory procedure for Heavy Goods Vehicles driving schools to block book driving tests in advance. When the fee for tests was increased in August 1976 the Department informed the schools' trade association that advance bookings at the old fee would not be accepted for dates after the beginning of September 1976. The complainants, a driving school, objected to the above arrangements. The P.C.A. criticised the poor publicity for the new arrangements but rejected any suggestions of maladministration.

12. C.90/77 Department of Transport P.309

By s.234 Customs and Excise Act 1952 where a vehicle excise licence had been issued in return for a cheque which was later dishonoured the licence was deemed to be void from issue and the Department were required to write to the registered keeper within seven days demanding the return of the licence. The complainant paid a garage to obtain two licences for him. Subsequently the cheques written by the garage were dishonoured. Instead of writing to the complainant the Department followed a non statutory procedure of trying to obtain payment from the garage. Eventually these attempts failed and the Department wrote to the complainant, four months after the licences had been issued, informing him that they were void. He complained, inter alia, about the Department's delay in communicating with him. The P.C.A. upheld this aspect of the complaint noting that the

Department were trying to help the complainant. Furthermore, the Commissioner reported that the Department had abandoned their non statutory procedure of pursuing third parties.

Third Report of the P.C.A. for 1977-1978 H.C.246 (1977-78)

13. 15/351/77 Ministry of Agriculture, Fisheries and Food P.9

Under s.28 Agriculture Act 1970 the Secretary of State had a statutory discretion to provide, inter alia, capital grants towards the provision of water supplies for farming businesses. The Department issued a booklet setting out the terms on which grants would be made available, one of which required prior approval of schemes by the Department. The complainant had an underground pipeline installed and then sought a grant. His application was refused because it had not been submitted in accordance with the above procedure. He complained to the P.C.A. about the Department's handling of his application. The Commissioner expressed his approval of the procedure and rejected the complaint.

Fifth Report of the P.C.A. for 1977-1978 H.C.524 (1977-78)

14. 3B/132/77 Department of Transport P.281

Up until 1977 the transfer of cherished registration marks for vehicles was undertaken via a set of non statutory rules. Then, because of law enforcement problems, the Road Vehicles (Registration and Licensing) Regulations 1971 were amended to provide a statutory basis for such transfers. The complainant criticised the lack of transitional arrangements made by the Department. The P.C.A. agreed that genuine enthusiasts

had suffered from this lacuna, but he could not question the Department's decision not to provide transitional arrangements.

Seventh Report of the P.C.A. for 1977-1978 H.C.664 (1977-78)

15. 4/36/77 D.o.E. P.38

The Property Services Agency had acquired a country estate from the Ministry of Defence. Several years later the P.S.A. sold the estate, on the open market, to a property developer. The complainants, an amenity group, protested about the manner and nature of the sale. The P.C.A. found the P.S.A. had internal departmental instructions regulating discussions with local planning authorities over the disposal of P.S.A. properties. In the Commissioner's view this sale violated those procedures and demonstrated maladministration. However, no remedy could be provided for the complainants; but the Agency had agreed to revise their departmental instructions.

P.C.A. Selected Cases 1981 Volume One H.C.132 (1981-82)

16. C.384/81 Ministry of Defence P.6

In 1980 the Government sent out a directive to all departments changing the Crichel Down rules governing the disposal of surplus public land. From August onward land should always be offered back to its former private owners unless the character of the land had materially changed. The complainants applied to buy some surplus land from the Ministry. Without consulting the Property Services Agency the Ministry agreed to the sale which was in violation of the new rules. When the Ministry discovered

their mistake they informed the complainants that they could not buy the land. The P.C.A. criticised the Ministry for failing to enquire about the relevant rules but concluded that the complainants had not suffered any injustice.

17. C.180/81 Department of Employment P.21

The handbook which the Department issues to all its Unemployment Benefit Offices restricts the questions, from members of the public, about redundancy payments that ordinary officers should answer. The complainant asked about his entitlement to redundancy payments at an ordinary office and was referred to a special redundancy payments office. He complained to the P.C.A. about his treatment by the Department. The Commissioner dismissed his complaint with the conclusion that any failure in communications should be attributed to the complainant.

18. C.865/80 D.H.S.S. P.57

The 'fuel direct' scheme operated by the Department was designed to prevent claimants having their electricity cut off because of growing arrears in their electricity bills. Under the scheme the Department paid a proportion of a claimant's weekly benefits directly to their local electricity board. The complainant was within the scheme when her office was told not to make any more payments under the scheme to the London Electricity Board. Later the complainant had her electricity cut off and she complained to the P.C.A. about the Department's treatment of her case. He criticised the Department for shortcomings in their behaviour but these did not amount to maladministration.

19. C.483/80 Scottish Home and Health Department P.96

The complainant protested about the way her offer to buy a property being sold by the Department was handled. The P.C.A. upheld her complaint finding that the existing Departmental guidelines to staff was inadequate. To remedy the complainant's injustice the Department have given her an exgratia payment of £100 and have issued additional guidelines to their staff.

P.C.A. Selected Cases 1981 Volume Two H.C.327 (1981-82)

20. C.1/81 D.H.S.S. P.36

The relevant public body in this case was a specialist organisation under the control of the D.H.S.S., This organisation had a statutory power to deal in land but was subject to guidance issued by the Secretary of State. The organisation failed to clearly follow that guidance with the consequence that the complainants were unable to acquire property being sold by the organisation. The P.C.A. considered the organisations' failures amounted to maladministration, but did not recommend financial compensation to remedy the complainants' injustice.

21. C.911/80 Home Office P.54

The complainant, a prisoner, protested about a number of matters including the censoring of his mail. The P.C.A. found that one letter from the complainant's daughter was detained by the prison authorities even though it did not contain any material which was required to be withheld under Departmental standing orders. The Commissioner considered an apology from the Department to be a suitable remedy.

P.C.A. Selected Cases 1981 Volume Three H.C.484 (1981-82)

22. C.544/81 Inland Revenue P.68

To prevent building sub-contractors evading income tax Parliament required contractors to deduct income tax unless the sub-contractor had an exemption certificate (S.70 (7) Finance (No. 2) Act 1975). Tax Inspectors had a discretion to (a) refuse a sub-contractor an exemption certificate; or (b) give him a limited exemption certificate; or (c) award him a general exemption certificate. Departmental instructions told Inspectors that if they gave a sub-contractor a limited certificate and he strongly pressed for a general one the case should be referred to head office. The complainant was initially awarded a general certificate but when it was renewed he was only given a limited one. Despite his protests the Inspector refused to grant him a general certificate. The P.C.A. criticised the Inspector for failing to pass the case up to his head office and the Chairman of the Board of the Inland Revenue has apologised to the complainant.

P.C.A. Selected Cases 1981 Volume Four H.C.8 (1982-83)

23. C.486/81 Customs and Excise P.6

Departmental instructions regulated officers offers to 'compound' proceedings against persons suspected of breaking the law. These instructions provided, inter alia, who was to make the decision to compound proceedings, what financial penalty should be imposed on the person, how the person should be interviewed and what legal rights they should be accorded. The complainant had proceedings against herself for allegedly 'recklessly' completing a customs declaration (contrary to s.167 (1)

Customs and Excise Management Act 1979) compounded for a penalty payment of £280. She complained to the P.C.A. about her treatment by the Department. The Commissioner was extremely critical of the contents of the instructions with the consequence that the Department agreed to repay the complainant her £280 and amend their instructions in the light of the P.C.A.'s views.

24. C.871/82 Inland Revenue P.92

Exceptionally, under s.103 (3) Capital Gains Tax Act 1979, a person's sale of their main dwellinghouse could be liable to C.G.T., Departmental instructions stated that difficult cases involving s.103 (3) should be referred to head office. The complainant had his sale assessed for C.G.T. under the above section, but after employing counsel he successfully appealed against the Inspector's assessment to the General Commissioners. He complained to the P.C.A. about the Inspector's actions. The P.C.A. reported that the Deputy Chairman of the Board of the Inland Revenue had acknowledged the Inspector's failure to pass the case upwards and, therefore, the Department would pay the complainant's legal costs. The P.C.A. considered this a satisfactory outcome.

Interpretative Guidance

Report of the P.C.A. for 1968 H.C.129 (1968-1969)

1. C.316/68 Customs and Excise P.20

After consultations with the relevant trade association the Department issued guidance stating that in their view 'translucent panels identifiable as lighting diffusers" fell within Group 14 Part I Schedule I Purchase Tax Act 1968 as "fittings of a kind used for domestic or office lighting". Subsequently the complainants were subjected to purchase tax being levied on their products by the local office of the Department. Several years later the Department's interpretation was successfully challenged by another company before the High Court. The complainants then protested to the P.C.A. that the Department's interpretation amounted to an act of maladministration. The Commissioner concluded that the test for maladministration in the creation of interpretative guidance was the consideration given to the interpretation prior to its promulgation, and applying that test there had been no maladministration in this case.

2. C.261/68 Post Office P.94

Under the Wireless Telegraphy Act 1949 the Postmaster General was empowered to issue licences for radios. The conditions of the licences stated that they covered any number of radios used by "resident members of the licencees' household". Internal guidance issued to Post Office staff stated that regarding boarding schools the above condition was interpreted to cover all the pupils residing with a housemaster. In 1966 the Post Office's solicitors proposed a narrow interpretation of the condition which necessitated each pupil purchasing his/her own licence. During

the following year this new interpretation was sent to all schools in an administrative memorandum issued by the Department of Education and Science (No. 9/67). The new interpretation caused many protests and alternative interpretations were sent to the Post Office. Later that year the Post Office again revised its interpretation and decided that in its view boarding school pupils were covered by their parents' licences. A school bursar complained about the Post Office's conduct in issuing the above memorandum. The P.C.A. rejected any suggestion of maladministration as the memorandum had been based on clear legal advice.

Fourth Report of the P.C.A. for 1972-1973 H.C.290 (1972-73)

3. C.209/G Customs and Excise P.4

Under Group 32 of Schedule I Purchase Tax Act 1963 "toilet preparations" were liable to purchase tax. By their Public Notice No. 78 the Department excluded "soap substitutes which are shown to the satisfaction of the Commissioners to contain abrasives or other special ingredients for the removal of excessive dirt". The complainants proposed to manufacture hand cleaning pads and asked their local office if they came within the above interpretation. The office informed them that they did and the complainants began manufacturing the pads. Several months later the Department changed their opinion of the nature of the pads and subjected them to purchase tax. The complainants critise the advice they received from the local office. After examining the Department's files the P.C.A. concluded that the original decision on the nature of the pads constituted an act of maladministration and the Department agreed to give the complainants an ex-gratia payment of £6,000 as compensation for the injustice they

had suffered.

4. C.264/G Home Office P.119

Section 60 Criminal Justice Act 1967 provided that the Secretary of State might release a prisoner on licence, where the Parole Board had so recommended after the prisoner had served at least one third of his sentence. By s.49 Prison Act 1952 any time during which a prisoner was unlawfully at large should be ignored when calculating his remaining period of detention. Standing Orders interpreted these two statutory provisions to provide that when calculating the Parole Eligibility Date of prisoners who had been unlawfully at large staff should add the time at large to the length of sentence and divide by three. A prisoner complained to the P.C.A. about this interpretation. The P.C.A. expressed his view that the above method was a misinterpretation of the law and proposed his own interpretation. The Department accepted the P.C.A.'s method and agreed to reconsider the complainant's case on that basis.

5. C.20/G Department of Trade and Industry P.165

Under s.1 Industrial Development Act 1966 the Secretary of State had a discretion to make grants towards approved capital expenditure on "plant and machinery". Departmental guidance elaborated the boundaries of plant and machinery to the extent of establishing what type of insulation would qualify for a grant. The complainants criticised the Department's decision to award them a grant for only certain of their cold stores. The P.C.A. reported that the large scale of application for grants necessitated the Department's development of detailed guidance and that this had been applied without maladministration to the complainants' applications.

Fifth Report of the P.C.A. for 1977-1978 H.C.524 (1977-78)

6. 4/409/77 D.o.E. P.42

The Countryside Act 1968 required surveying authorities to re-classify public rights of way formerly classified as Roads Used as Public Paths (R.U.P.P.). The Department issued a circular interpreting the Act as allowing R.U.P.P. to be classified as footpaths or bridleways or byeways. In 1975 the British Horse Society successfully challenged that interpretation before the courts. Subsequently the Department considered issuing a new circular setting out the classifications available to surveying authorities and consulted local authority associations and other interested groups about its contents. The complainants, an amenity group, protested to the P.C.A. about, inter alia, the delay involved in the Department's promulgation of the new circular. The P.C.A. criticised the Department for the time taken in producing the new circular but he did not consider that it amounted to maladministration.

Seventh Report of the P.C.A. for 1977-1978 H.C.664 (1977-78)

7. 1A/164/78 Inland Revenue P.214

Extra statutory concession No. A7 offered by the Department allowed ex-miners to receive their free coal (or a cash payment in lieu thereof) without having to pay income tax on it. By an agreement with the National Coal Board the Department had produced a definition of 'a miner' for the purposes of the concession. The complainant had started off life as a miner but had retired as a colliery manager and, therefore, had not been accorded the benefit of the concession. He complained of his treatment

to the P.C.A.. The Commissioner found that the Department's application of their definition to his case did not involve maladministration.

P.C.A. Selected Cases 1982 Volume Three H.C.484 (1981-82)

8. C.856/80 Department of Transport P.80

When the Department voluntarily acquire land they often agree to provide restoration work in addition to financial compensation, however, neither this work nor the financial arrangements of purchase are governed by the Land Compensation Act 1973 which applies to compulsory purchase. The complainant had part of his land compulsorily acquired and he sold another part voluntarily. He complained about the Department's dealings with his land and the content of their booklets setting out their rights and obligations. In response to the P.C.A.'s investigation the Department agreed that their booklets were defective and agreed to revise them. They also settled their financial dealings with the complainant and the Commissioner concluded that these measures provided a satisfactory outcome of the investigation.

APPENDIX C

V.A.T. CASES

Cases discovered as a result of the research considered in Chapter Seven. The cases are listed in chronological order:-

En-tout-cas Ltd. v. The Commissioners of Customs and Excise (1973) V.A.T.T.R. 101.

The B.B.C. v. The Comm. (1974) V.A.T.T.R. 100.

Astric Products Ltd. v. The Comm. (1976) V.A.T.T.R. 17.

Raymond Walle v. The Comm. (1976) V.A.T.T.R. 101.

Roger Vulgar v. The Comm. (1976) V.A.T.T.R. 197.

J H Corbitt (Numismatists) Ltd. v. The Comm. (1977) V.A.T.T.R. 194.

Douglas Howard Miller v. The Comm. (1977) V.A.T.T.R. 241.

Keith Brian Kennell v. The Comm. (1977) V.A.T.T.R. 265.

Mansell Youell Developments Ltd. v. The Comm. (1978) V.A.T.T.R. 1.

Normal Motor Factors Ltd. v. The Comm. (1978) V.A.T.T.R. 20.

G.U.S. Merchandise Corp. Ltd. v. The Comm. (1978) V.A.T.T.R. 28.

Roger Kyffin v. The Comm. (1978) V.A.T.T.R. 175.

Cando 70 v. The Comm. (1978) V.A.T.T.R. 211.

Darlington Borough Council v. The Comm. (1980) V.A.T.T.R. 120.

Guardia Shutters Ltd. v. The Comm. (1980) V.A.T.T.R. 130.

G A Harrison v. The Comm. (1981) V.A.T.T.R. 164.

A L Housden v. The Comm. (1981) V.A.T.T.R. 217.

Stirlings (Glasgow) Ltd. v.The Comm. (1982) V.A.T.T.R. 116.

David Wickens Properties Ltd. v. The Comm. (1982) V.A.T.T.R. 143.

Grimsby and District Sunday Football League v. The Comm. (1982) V.A.T.T.R. 210.

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